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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 19-3430

MILDRED HEYER, APPELLANT,

V.

ROBERT L. WILKIE,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before MEREDITH, *Judge*.

MEMORANDUM DECISION

Note: Pursuant to U.S. Vet. App. R. 30(a), this action may not be cited as precedent.

MEREDITH, *Judge*: The appellant, Mildred Heyer, surviving spouse of veteran Foster L. Heyer, through counsel appeals a January 25, 2019, Board of Veterans' Appeals (Board) decision that declined to reopen a claim for service connection for the cause of the veteran's death and denied entitlement to accrued benefits and death pension. Record (R.) at 5-25. The appellant does not raise any argument concerning the Board's denial of entitlement to accrued benefits and death pension; therefore, the Court finds that she has abandoned her appeal of those issues and will dismiss the appeal as to the abandoned issues. *See Pederson v. McDonald*, 27 Vet.App. 276, 285 (2015) (en banc). This appeal is timely, and the Court has jurisdiction to review the Board's decision pursuant to 38 U.S.C. §§ 7252(a) and 7266(a). Single-judge disposition is appropriate. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the following reasons, the Court will affirm the Board's decision declining to reopen a claim for service connection for the cause of the veteran's death.

I. BACKGROUND

The veteran served on active duty in the U.S. Army from June 1957 to December 1957 and in the U.S. Air Force from January 1958 to January 1978. R. at 37, 1344, 1346, 1348, 1350, 1352,

1354. The veteran died on September 16, 1982; his death certificate reflects immediate causes of death of respiratory arrest, metabolic acidosis, and hepatorenal failure. R. at 1047. Medical treatment records from September 1982 reflect his terminal diagnoses were severe gastrointestinal bleed and alcoholic liver disease with ascites and probable varices. R. at 1296-98. He was not receiving disability compensation at the time of his death.

The next month, the appellant filed a claim for dependency and indemnity compensation (DIC). R. at 1437-40. She stated in her application that the veteran had become physically violent toward her due to alcoholism beginning in 1974 and his drinking had become worse until their legal separation in 1979. R. at 1438. A VA regional office (RO) denied the claim in November 1982, noting that, although the veteran "was a habitual excessive drinker" during service, he did not have liver or kidney disease during or within 1 year of service or "any service-connected conditions which could have contributed to his death." R. at 1410. The appellant filed a Notice of Disagreement (NOD), R. at 1370, and the RO issued a Statement of the Case, R. at 1336-39. She perfected an appeal to the Board, averring that the veteran was abusing alcohol during service—as evidenced by excessive drinking, sexual abuse of their daughter beginning in 1971, physical abuse of the appellant and their children, and being ordered to attend an alcohol abuse program by the Air Force—and that the liver and kidney disease leading to his death must have begun during service. R. at 1311-18, 1321.

In January 1985, the Board denied entitlement to service connection for the cause of the veteran's death. R. at 1269-75. The Board acknowledged the appellant's contentions that the veteran's alcohol use and liver problems that led to his death began during military service, as well as her reports of "inappropriate conduct related to alcohol abuse." R. at 1271. The Board then discussed the veteran's service and post-service medical records, R. at 1272-73, but found that, "[w]hile the veteran had an alcohol abuse problem during service, that is not enough to service connect alcohol-related physical disorders which were noted more than [1] year after service." R. at 1274.

Additional service treatment records were subsequently associated with the claims file, reflecting that, in March 1973, the veteran sustained "blunt trauma to the face" during a motor vehicle accident, which resulted in a "[f]ractured maxilla, left posterior alveolar segment." R. at 1227-29. The appellant filed a second DIC claim in August 1999. R. at 1195-200. She concurrently filed a statement in which she asserted that the veteran abused alcohol and described attitude,

personality, and behavior changes following his service in Vietnam. R. at 1185-94. In March 2000, the RO determined that new and material evidence sufficient to reopen the claim had been submitted, but denied the claim on the merits. R. at 1149-50. Specifically, as to the appellant's contentions regarding the veteran's alcohol abuse, the RO noted that "[a]lcoholism is considered willful misconduct and is not a basis for granting monetary benefits for compensation or pension under the laws administered by VA." R. at 1149. The RO notified the appellant of that decision the following month, and she did not appeal. R. at 1146-47.

In February 2012, the appellant filed another DIC claim, asserting that the veteran was exposed to environmental hazards in Vietnam that led to his respiratory and heart problems, and that his abusive and behavioral problems had been caused by post-traumatic stress disorder (PTSD). R. at 1039-46. After the RO denied the claim, she disagreed and perfected her appeal. R. at 461-524, 788-854, 861-62; *see* R. at 655-91. She testified before a member of the Board in May 2018 regarding changes in the veteran's attitude and behavior after he returned from Vietnam. R. at 102-06; *see* R. at 89-107.

On January 25, 2019, the Board determined that new and material evidence had not been submitted to reopen the claim for service connection for the cause of the veteran's death. R. at 5-25. This appeal followed.

II. ANALYSIS

The appellant argues that the Board provided inadequate reasons or bases for declining to reopen the claim for service connection for the cause of the veteran's death because it failed to consider and develop the reasonably raised theory that the veteran's alcohol abuse was secondary to an in-service traumatic brain injury (TBI) or PTSD, address favorable medical evidence or properly analyze the evidence related to that theory, properly apply the benefit of the doubt, and apply the regulations pertaining to service connection. Appellant's Brief (Br.) at 3-9. The Secretary counters that the appellant did not submit new and material evidence to reopen her claim, and otherwise disputes her arguments and requests that the Court affirm the Board's decision. Secretary's Br. at 9-16. The appellant did not file a reply brief.

"If new and material evidence is presented or secured with respect to a claim which has been disallowed, the Secretary shall reopen the claim and review the former disposition of the

claim." 38 U.S.C. § 5108 (2018); *see* 38 C.F.R. § 3.156(a) (2018).[1] The evidence "must be *both* new *and* material." *Smith v. West*, 12 Vet.App. 312, 314 (1999). New evidence is "existing evidence not previously submitted to [VA]," and material evidence is "existing evidence that, by itself or when considered with previous evidence of record, relates to an unestablished fact necessary to substantiate the claim." 38 C.F.R. § 3.156(a). New and material evidence "can be neither cumulative nor redundant of the evidence of record at the time of the last prior final denial of the claim sought to be reopened and must raise a reasonable possibility of substantiating the claim." *Id.*; *see Shade v. Shinseki*, 24 Vet.App. 110, 121 (2010).

The Board's determination of whether new and material evidence has been submitted is a finding of fact, which the Court reviews for clear error. *See Prillman v. Principi*, 346 F.3d 1362, 1366-67 (Fed. Cir. 2003). A finding of fact is clearly erroneous when the Court, after reviewing the entire evidence, "is left with the definite and firm conviction that a mistake has been committed." *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948); *see Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990). As with any material issue of fact or law, the Board must provide a statement of the reasons or bases for its determination "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); *see* 38 U.S.C. § 7104(d)(1); *Gilbert*, 1 Vet.App. at 56-57.

In the decision on appeal, the Board considered whether new and material evidence had been submitted to reopen the claim for service connection for the cause of the veteran's death under numerous theories, including that the veteran's alcoholism was directly related to service; his death was related to herbicide exposure in Vietnam; and his alcohol abuse was secondary to PTSD. R. at 10-19. The appellant limits her arguments to the theory of alcohol abuse being secondary to PTSD and the Board's failure to consider a theory of secondary service connection for alcohol-related disabilities as a result of an in-service TBI, Appellant's Br. at 3-9; therefore, she has abandoned any challenge to the Board's findings on the other theories, *see Pederson*, 27 Vet.App. at 285.

[1] The statutory and regulatory provisions governing reopening have been amended effective February 19, 2019, as part of VA's transition to a new appeals process. *See* Veterans Appeals Improvement and Modernization Act of 2017 (VAIMA), Pub. L. No. 115-55, § 2(q)(1), 131 Stat. 1105 (Aug. 23, 2017); 84 Fed. Reg. 2449 (Feb. 7, 2019) (providing notice that the effective date of the new VA appeals system outlined in the VAIMA is February 19, 2019). All references to those authorities are to the versions in effect in 2018, when the Board issued its decision.

With respect to whether the veteran's alcohol abuse was secondary to PTSD, the Board found:

> [I]nsofar as the appellant contends that the [v]eteran's alcohol abuse may be secondary to a mental health illness such as [PTSD] he incurred in service, . . . the appellant has not provided any new evidence to support such a claim. Her statements and the lay statements she provided were mere duplicative of the evidence she has provided in the past. Unfortunately, now, it will probably never be known if the [v]eteran 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 crux of the appellant's arguments is that the Board failed to properly evaluate the evidence of record, which she contends shows that the veteran had undiagnosed PTSD and TBI, which were etiologically related to his alcohol abuse that resulted in death. *See* Appellant's Br. at 3-8. The Court is not persuaded by her arguments, because, ultimately, she fails to show that she submitted new and material evidence in support of either theory. First, she does not cite to any evidence of record suggesting that the veteran suffered from the claimed conditions or that the conditions led to his death; rather, she relies on assertions in her brief. *See Coker v. Nicholson*, 19 Vet.App. 439, 442 (2006) (per curiam) ("The Court requires that an appellant 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."), *vacated on other grounds sub nom. Coker v. Peake*, 310 F. App'x 371 (Fed. Cir. 2008) (per curiam order); *see also Locklear v. Nicholson*, 20 Vet.App. 410, 416 (2006) (Court unable to find error when arguments are undeveloped); *Kern v. Brown*, 4 Vet.App. 350, 353 (1993) (noting that neither counsel nor the appellant was qualified to explain the significance of medical evidence); *Hyder v. Derwinski*, 1 Vet.App. 221, 225 (1991) ("Lay hypothesizing . . . serves no constructive purpose and cannot be considered by this Court.").

More importantly, the appellant does not allege or point to evidence reflecting that she submitted any *new* evidence in support of her claim. *See* 38 C.F.R. § 3.156(a). With respect to the PTSD theory, the Board expressly noted that her assertions were duplicative of evidence she had previously provided. R. at 18-19. She does not challenge that finding. And, although she relies on medical records regarding the 1973 motor vehicle accident to contend that the veteran's alcohol

abuse was secondary to a TBI, the Secretary asserts, and the appellant did not file a reply brief countering, that the evidence is not new because it was part of the record at the time of the final April 2000 rating decision. Secretary's Br. at 13-14. To the extent that she asserts that it is a "new theory of entitlement" that the Board should have considered, Appellant's Br. at 4, "[t]he presentation of new arguments based on evidence already of record at the time of the previous decision does not constitute the presentation of new evidence." *Untalan v. Nicholson*, 20 Vet.App. 467, 470 (2006); *cf. Boggs v. Peake*, 520 F.3d 1330, 1336 (Fed. Cir. 2008) (noting that, "if the evidence supporting the veteran's new theory of causation constitutes new and material evidence, then the VA must reopen the veteran's claim").

Last, the appellant contends that the Board failed to apply the benefit of the doubt and the regulations regarding service connection. Appellant's Br. at 8-9. However, as explained above, she has not shown error in the Board's finding that she did not submit new and material evidence to reopen a claim for service connection for the cause of the veteran's death. Thus, she has not demonstrated that the benefit of the doubt as to the merits of her claim or the regulations pertaining to service connection were for application. *See Butler v. Brown*, 9 Vet.App. 167, 171 (1996) (holding that "the Board must preliminarily decide that new and material evidence has been presented in a case it has previously adjudicated, before addressing the merits of the claim . . . . [and] once the Board finds that no such evidence has been offered, that is where the analysis must end"); *see also* 38 U.S.C. § 5107(b) (the "benefit of the doubt" doctrine provides that, "[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"); *Schoolman v. West*, 12 Vet.App. 307, 311 (1999) (holding that, where the preponderance of the evidence is against the appellant's claims, "the benefit of the doubt doctrine does not apply"); 38 C.F.R. § 3.102 (2019). In sum, the Court cannot conclude that the appellant has demonstrated that the Board's determination was clearly erroneous or inadequately explained. *See Berger v. Brown*, 10 Vet.App. 166, 169 (1997) (holding that, on appeal to this Court, the appellant "always bears the burden of persuasion"); *see also Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc), *aff'd per curiam*, 232 F.3d 908 (Fed. Cir. 2000) (table).

III. CONCLUSION

The appeal of the Board's January 25, 2019, decision denying entitlement to accrued benefits and death pension is DISMISSED. After consideration of the parties' pleadings and a review of the record, the Board's decision declining to reopen a claim for service connection for the cause of the veteran's death is AFFIRMED.

DATED: April 28, 2020

Copies to:

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