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

No. 19-0608

SANDRA J. COREY, APPELLANT,

v.

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

Before DAVIS, *Senior Judge*.<sup>1</sup>

**MEMORANDUM DECISION**

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

DAVIS, *Senior Judge*: Sandra J. Corey, the widow of U.S. Army veteran Stephen D. Corey, appeals a November 8, 2018, Board of Veterans' Appeals decision that denied service connection for Mr. Corey's cause of death.<sup>2</sup> Because the Board's statement of reasons or bases was inadequate, the Court will set aside the November 2018 decision and remand the matter for further development.

**I. ANALYSIS**

In November 2018, the Board denied Ms. Corey service connection for her husband's cause of death, respiratory failure due to pulmonary hypertension and right heart failure.<sup>3</sup> The Board said the evidence does not show that the veteran's right heart failure is the same disability as ischemic heart disease, which is entitled to presumptive service connection.<sup>4</sup> The Board stated that it relied

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<sup>1</sup> Judge Davis is a Senior Judge acting in recall status. *In re: Recall of Retired Judge*, U.S. VET. APP. MISC. ORDER 03-20 (Jan. 2, 2020).

<sup>2</sup> Record (R.) at 4 (Ms. Corey does not appeal the Board's denial of dependency and indemnity compensation under 38 U.S.C. § 1318; therefore, this matter is considered abandoned on appeal. *See Pederson v. McDonald*, 27 Vet.App. 276, 283-85 (2015) (en banc)).

<sup>3</sup> R. at 4-10.

<sup>4</sup> *Id.* at 6-7.

on the September 2016 VA opinion because "[t]he VA examiner had the benefit of reviewing the entire claims file, acknowledged the right heart failure that led or contributed to the Veteran's death, and still concluded that the Veteran did not have the presumptive heart disability of ischemic heart disease."<sup>5</sup>

Ms. Corey primarily argues that the Board erred in denying service connection for Mr. Corey's cause of death.<sup>6</sup> She contends the Board erred by finding that VA satisfied its duty to assist because VA failed to obtain Mr. Corey's private treatment records; the September 2016 VA medical opinion was inadequate to determine service connection; and VA failed to obtain an opinion addressing direct causation from herbicide exposure.<sup>7</sup> Ms. Corey also argues that the Board's decision lacked an adequate statement of reasons or bases to deny service connection for Mr. Corey's cause of death.<sup>8</sup> She asserts that the Board failed to address Mr. Corey's private treatment records or the outstanding records relevant to his claim; the Board made an impermissible medical inference; and the Board failed to explain whether Mr. Corey's presumptively service-connected diabetes mellitus contributed to his death.<sup>9</sup>

The Secretary concedes that the Board's statement of reasons or bases was inadequate and that the Court should vacate the Board's decision as to denial of service connection.<sup>10</sup> Specifically,

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<sup>5</sup> *Id.* at 7 ("If the disabilities were essentially the same, or the right heart failure could qualify under the category of ischemic heart disease, the examiner would have so stated.").

<sup>6</sup> Appellant's Brief (Br.) at 7-8.

<sup>7</sup> *Id.* at 8-10 ("A November 2001 VA treatment record reflects that Mr. Corey continues to see outside physicians"), 11-14 ("The examiner stated that Mr. Corey died from respiratory failure and pulmonary hypertension, and that hypertension likely caused the right heart failure listed on the death certificate. [] However, beyond reference to the death certificate the VA examiner did not address Mr. Corey's heart failure, which a November 2001 VA treatment record shows to have been a *chronic* condition."), 14-16 ("Mrs. Corey expressly raised the issue of whether her husband's heart condition was caused by Agent Orange exposure [], and therefore, VA's duty to assist requires a medical opinion addressing the theory of direct causation by herbicide exposure.").

<sup>8</sup> *Id.* at 17.

<sup>9</sup> *Id.* at 18-19 ("The Board's discussion of the evidence consisted solely of the conditions identified by the Certificate of Death, Mrs. Corey's assertions, and the September 2016 VA medical opinion."), 19-20 ("The Board's statement constitutes an impermissible medical inference because the examiner only stated that Mr. Corey 'less likely as not suffered from ischemic heart disease[.]' reasoning that there 'is no evidence in the records of symptoms or testing that confirmed the exist[e]nce of ischemic heart disease.' [] In other words, the examiner did not specifically address whether Mr. Corey's right heart failure, described as chronic congestive heart failure [] qualifies as an ischemic heart disease contemplated by the presumptive regulation."), 21-22 ("[E]ven if diabetes did not worsen Mr. Corey's terminal conditions, a question remains as to whether diabetes caused 'debilitating effects and general impairment of health to an extent that would render [him] materially less capable of resisting the effects' of respiratory failure and pulmonary hypertension.").

<sup>10</sup> Secretary's Br. at 4-7

"[a]ppellant explicitly raised the issue of whether the Veteran's heart condition was due to Agent Orange exposure. [] The Board did not provide any discussion of whether the Veteran's heart condition was due to Agent Orange exposure on a direct, rather than presumptive, basis."<sup>11</sup> Because the Secretary concedes that vacatur and remand are warranted here, the Secretary argues that the Court does not need to address Ms. Corey's other arguments.<sup>12</sup>

A death will be considered service connected when the death's principal or contributory cause was a service-connected disability.<sup>13</sup> A disability qualifies as the principal cause of death when that disability "singly or jointly with some other condition, was the immediate or underlying cause of death or was etiologically related thereto."<sup>14</sup> A disability qualifies as a contributory cause of death when that disability "contributed substantially or materially" to death, "combined to cause death," or "aided or lent assistance to the production of death."<sup>15</sup>

A denial of service connection is a finding of fact reviewed under the "clearly erroneous" standard.<sup>16</sup> In addition, the Board is required to provide a written statement of the reasons or bases, and the statement must "explain the Board's reasons for discounting favorable evidence" and "discuss all issues raised by the claimant or the evidence of record[.]"<sup>17</sup> The statement must also 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.<sup>18</sup>

The Court agrees with the Secretary that the Board's statement of reasons or bases was inadequate.<sup>19</sup> In reaching his opinion that the veteran did not suffer from ischemic heart disease, the September 2016 VA examiner explained: "There is no evidence in the records of symptoms or testing that confirmed the exist[e]nce of ischemic heart disease."<sup>20</sup> Ms. Corey, however, raised the

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<sup>11</sup> *Id.* at 4.

<sup>12</sup> *Id.* at 6 ("The Secretary does not concede error as to any of Appellant's remaining arguments.").

<sup>13</sup> *Wise v. Shinseki*, 26 Vet.App. 517, 524 (2014) (citing 38 C.F.R. § 3.312(a)).

<sup>14</sup> *Id.* (citing 38 C.F.R. § 3.312(b)).

<sup>15</sup> *Id.* (citing 38 C.F.R. § 3.312(c)).

<sup>16</sup> *See Gilbert v. Derwinski*, 1 Vet.App. 49, 52-53 (1990).

<sup>17</sup> *See Harper v. Wilkie*, 30 Vet.App. 356, 362-63 (2018).

<sup>18</sup> *See* 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *Simon v. Derwinski*, 2 Vet.App. 621, 622 (1992).

<sup>19</sup> *See Harper*, 30 Vet.App. at 362-63.

<sup>20</sup> *R.* at 104.

issue whether her husband's heart condition was caused by Agent Orange exposure during his service in Vietnam.<sup>21</sup> Although the Board acknowledged in reciting the evidence that Mr. Corey's exposure to herbicides was conceded given his service in Vietnam, the Board addressed this evidence only on a presumptive basis and not a direct basis.<sup>22</sup> Given these deficiencies, a remand is required.<sup>23</sup>

Additionally, because remand is warranted, the Court will not now address Ms. Corey's other arguments.<sup>24</sup> Ms. Corey is free to submit those arguments on remand, along with any additional evidence or argument,<sup>25</sup> and the Board must consider any evidence or argument submitted when readjudicating the service connection matter.<sup>26</sup>

## II. CONCLUSION

On consideration of the foregoing, the Court SETS ASIDE the Board's November 8, 2018, decision as to Ms. Corey's service-connection claim and REMANDS this matter for readjudication.

DATED: May 4, 2020

Copies to:

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<sup>21</sup> See *id.* at 97 ("On August 30, 2011, we received your original claim for service[-]connected death. You contended the veteran's death was the result of ischemic heart disease related to military herbicide exposure in Vietnam."), 109 ("Surviving Spouse called in regard[] to 06/17/2013 NOD. She states that she is obtaining letter f[ro]m Dr. Weinberg that Veteran's death is directly related to Agent Orange."), 609 ("Reviewed Claimant Letter dated 3/20/2012 and she states that disability should be listed as a heart condition due to Agent Orange Exposure").

<sup>22</sup> See *id.* at 6-7.

<sup>23</sup> *Andrews v. Shinseki*, 26 Vet.App. 193, 199 (2013) ("The Court determines that the Board's reasons or bases are inadequate, which frustrates judicial review and warrants remand."); see also *Tucker v. West*, 11 Vet.App. 369, 374 (1998) (remand appropriate where Board "failed to provide an adequate statement of reasons or bases for its determinations").

<sup>24</sup> See *Best v. Principi*, 15 Vet.App. 18, 20 (2001) (per curiam order) ("A narrow decision preserves for the appellant an opportunity to argue those claimed errors before the Board at the readjudication, and, of course, before this Court in an appeal, should the Board rule against him.").

<sup>25</sup> See *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order).

<sup>26</sup> See *Kay v. Principi*, 16 Vet.App. 529, 534 (2002).