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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 18-7183

DONIS PARKER, APPELLANT,

V.

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

Before ALLEN, *Judge*.

MEMORANDUM DECISION

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

ALLEN, *Judge*: Appellant Donis Parker is the surviving spouse of veteran J.P. Parker, who served the Nation honorably in the United States Army from February 1968 to February 1970.¹ In this appeal, which is timely and over which the Court has jurisdiction, she challenges a September 26, 2018, decision of the Board of Veterans' Appeals that denied entitlement to service connection for the veteran's cause of death.² Because the Board properly applied the law, did not clearly err, and adequately discussed its findings, we will affirm.

I. ANALYSIS

By way of background, the veteran served in Okinawa, Japan, from September 1969 to February 1970 with the 137th Ordinance Company.³ In September 2007, he filed a claim for service connection for PTSD and skin blisters and asserted in-service Agent Orange exposure.⁴

¹ Record (R.) at 152.

² The Board also determined that appellant submitted new and material evidence sufficient to reopen her cause-of-death claim. This is a favorable finding that the Court will not review. *See Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007).

³ R. at 481.

⁴ R. at 1104-13.

The veteran reported that he had worked in a dog kennel with dogs that had been in Vietnam and may have carried Agent Orange or other herbicides.⁵ On August 6, 2008, the veteran died of suspected myocardial infarction and Shy-Drager syndrome.⁶ In September 2008, appellant filed a claim for service connection for the cause of his death, which VA denied in April 2009.⁷ She did not appeal that decision.

In February 2012, appellant filed a request to reopen the cause-of-death claim, asserting that the veteran's heart problems and Shy-Drager syndrome were caused by his exposure to Agent Orange in service.⁸ In April 2012, VA denied reopening, and appellant appealed that decision. During her appeal, appellant submitted several articles discussing the use of herbicides in Okinawa. She also submitted a statement saying that the Air Force had confirmed Agent Orange was stored in Okinawa and noting a Board decision for another veteran that granted benefits based on Agent Orange exposure in Okinawa.⁹ She also noted that the Air Force Historical Institute found Agent Orange in Okinawa used by the Marine Corps before the Veteran's time in service.¹⁰

In developing the claim, VA sent requests to the Department of Defense (DoD) and the Joint Services Records Research Center (JSRRC) to confirm the veteran's service and search for evidence of herbicides in Okinawa. DoD concluded it could not identify "any location on the island of Okinawa where Agent Orange was used, tested, stored, or transported."¹¹ DoD further noted that Agent Orange "was developed for jungle combat operations," and because there was no combat on the island of Okinawa, there would have been no need for Agent Orange.¹² Finally, DoD reported that "Okinawa was not on the Agent Orange shipping supply line."¹³ Commenting on various media sources that reported Agent Orange in Japan, DOD found that none of those

⁵ R. at 774-75.

⁶ R. at 595.

⁷ R. at 597-604.

⁸ R. at 507.

⁹ R. at 127.

¹⁰ R. at 53.

¹¹ R. at 84.

¹² *Id.*

¹³ *Id.*

reports provided any actual documentation.¹⁴ Furthermore, the JSRRC was not able to find any records confirming the veteran's exposure to herbicides.¹⁵

The Board found the DoD to be "in the best position to determine whether Agent Orange or other herbicide agents were used, or even present, on the island of Okinawa while the [v]eteran was on active duty."¹⁶ It also relied on the JSRRC's inability to document that the veteran was exposed to herbicide agents.¹⁷ The Board considered the articles appellant submitted but found the conclusions in these articles "merely speculative" and the DoD report more probative.¹⁸ The Board addressed both the veteran's and the appellant's contentions regarding the veteran's potential Agent Orange exposure in Okinawa, finding neither the veteran nor appellant competent "to determine the cause of the [v]eteran's symptoms and death because it would involve medical inquiry into biological processes, anatomical relationships, and physiological functioning."¹⁹ The Board also found the veteran and appellant "not competent to state whether exposure to animals or items which were present in Vietnam would have exposed the [v]eteran to herbicide agents."²⁰ The Board noted appellant's request that the Marine Corps and Air Force be contacted for information but found this to be unnecessary because these services were a part of the DoD.²¹ Additionally, the Board noted appellant's reliance on another Board decision but cited 38 C.F.R. § 20.1303, which provides that Board decisions are only binding in that specific case.²² Ultimately, the Board concluded that "the preponderance of the evidence is against the claim of service connection for the cause of the [v]eteran's death."²³ This appeal followed.

Appellant argues that the Board failed to provide an adequate statement of its reasons or bases in relying on a DoD finding that there were no herbicides in Okinawa, Japan. She contends that the Board failed to discuss contrary evidence of record that noted that herbicides were used in

¹⁴ *Id.*

¹⁵ R. at 80.

¹⁶ R. at 13.

¹⁷ *Id.*

¹⁸ R. at 16-17.

¹⁹ R. at 15.

²⁰ *Id.*

²¹ R. at 14.

²² R. at 16.

²³ R. at 10.

Okinawa. She also asserts that the Board had a heightened duty to develop the record because the veteran's unit records were lost. Appellant further argues that based on articles she submitted, the Board should have obtained additional information from the Marine Corps and Air Force, that the Board had a duty to obtain information about the sources cited in the articles, or that the Board should have contacted the nonprofit organizations she cited before the Board. Finally, appellant maintains that the Board should have obtained a VA medical opinion about whether the veteran could have been exposed to herbicides based on his work with dogs who had been in Vietnam, since the Board found she and the veteran were not competent to report on it.

Pursuant to 38 U.S.C. § 1310, entitlement to dependency and indemnity compensation (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.²⁴ To establish service connection for the cause of the veteran's death, the evidence must show that the service-connected disability was either the primary or a contributory cause of death.²⁵ Whether the cause of a veteran's death is service connected is a finding of fact the Court reviews for clear error.²⁶ The Court will overturn the Board's finding only if the record offers no plausible basis for its decision and the Court is left with a definite conviction that the Board's decision was in error.²⁷

Establishing service connection generally requires evidence of (1) a current disability; (2) in-service incurrence or aggravation of a disease or injury; and (3) a nexus between the claimed in-service disease or injury and the present disability.²⁸ The Court reviews the Board's findings regarding service connection for clear error.²⁹

For all its findings on a material issue of fact and law, the Board must support its decision with an adequate statement of reasons or bases that enables a claimant to understand the precise bases for the Board's decision and facilitates review in this Court.³⁰

²⁴ *DeLaRosa v. Peake*, 515 F.3d 1319, 1323 (Fed. Cir. 2008); *Patricio v. Shulkin*, 29 Vet.App. 38, 44 (2017).

²⁵ 38 C.F.R. § 3.312(a) (2019).

²⁶ *See Wray v. Brown*, 7 Vet.App. 488, 492 (1995).

²⁷ *See Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990).

²⁸ *See Hickson v. West*, 12 Vet.App. 247, 253 (1999); 38 C.F.R. § 3.303(a) (2019).

²⁹ 38 U.S.C. § 7261(a)(4); *Dyment v. West*, 13 Vet.App. 141, 144 (1999).

³⁰ 38 U.S.C. § 7104(d)(1); *Gilbert*, 1 Vet.App. at 57.

Here, the Court finds no error in the Board's decision to deny service connection for the veteran's cause of death and its discussion is understandable and plausibly supports its conclusion. To the extent that appellant challenges the Board's reliance on the DoD's report of no herbicides in Okinawa, she appears to disagree with the Board's weighing of the evidence, which does not warrant remand. It is the Board's prerogative as a factfinder to assess the evidence and determine the weight to be assigned to it.³¹ The Board did so here in finding the DoD's report more probative than other evidence and providing a detailed rationale explaining why it did so. Thus, appellant has not met her burden of demonstrating error.³²

Appellant argues that the Board should have contacted the Air Force and Marine Corps for records to establish Agent Orange exposure in Okinawa. She also argues that VA should have obtained an Army report cited in an article she submitted. But the Board specifically addressed her argument about contacting military branches, finding it unnecessary because they were a part of DoD. The Board certainly did not err in that determination. The Court also notes that appellant mischaracterizes the article submitted, calling it both an "Army report" and "a 2009 statement from the VA."³³ Neither characterization is accurate.

Appellant also argues that VA had "constructive possession" of the documents cited in the article she submitted.³⁴ She presents little more than a bare conclusory assertion with no explanation that could conceivably be deemed a fully articulated argument. Given the underdeveloped nature of this argument, the Court will not consider it further.³⁵

To the extent that appellant argues the Board should have sought records from the Air Force Historical Foundation or Marine Corps Historical Institute, nongovernmental nonprofit organizations, appellant does not meet her burden of showing error in the Board's failure to obtain any such records.³⁶ She does not argue, nor does the evidence of record show, that she provided VA with sufficient information to obtain this evidence. Although she asserts before the Court that these organizations are outside the DoD, it is not clear that this information was provided to VA

³¹ See *Madden v. Gober*, 125 F.3d 1477, 1481 (Fed. Cir. 1997); *Owens v. Brown*, 7 Vet.App. 429, 433 (1995).

³² *Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc), *aff'd per curiam*, 232 F.3d 908 (Fed. Cir. 2000) (table).

³³ Appellant's Brief (Br.) at 8.

³⁴ *Id.*

³⁵ See *Locklear v. Nicholson*, 20 Vet.App. 410, 416-17 (2006).

³⁶ *Hilkert*, 12 Vet.App. at 151.

before the Board's decision. Thus, the Board did not clearly err in failing to obtain or try to obtain this evidence.

Appellant also argues that VA should have obtained a VA medical opinion to address whether it was possible that the veteran was exposed to Agent Orange through his work in a dog kennel because it found the veteran and appellant's statements not competent on that question. Again, appellant fails to meet her burden of demonstrating error in the Board's decision. She fails to cite any of the standards for assessing whether a VA examination is warranted. The Court will not further consider this underdeveloped argument.³⁷ Finally, appellant asserts that because VA presumes that military personnel who were in contact with airplanes used in Vietnam were exposed to herbicides, it is medically plausible that exposure to other things, such as dogs, that were in Vietnam could lead to exposure. Neither appellant nor her counsel has shown the medical or technical knowledge necessary to make such an assumption, and she presents no evidence to support her position. "Lay hypothesizing . . . serves no constructive purpose and cannot be considered by the Court."³⁸

In sum, appellant has failed to meet her burden of demonstrating prejudicial error in the Board's decision. The Court sees no error in the Board's decision and can understand the reasons or bases supporting the Board's denial of service connection for the veteran's cause of death. Thus, we will affirm.

II. CONCLUSION

After consideration of the parties' briefs, the governing law, and the record, the Court AFFIRMS the September 26, 2018, Board decision.

DATED: May 12, 2020

Copies to:

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VA General Counsel (027)

³⁷ See *Locklear*, 20 Vet.App. at 416-17.

³⁸ *Hyder v. Derwinski*, 1 Vet.App. 221, 225 (1991); see also *Kern v. Brown*, 4 Vet.App. 350, 352 (1993).