

*Designated for electronic publication only*

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

No. 19-3985

LYNN C. HULSMAN, APPELLANT,

v.

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

Before FALVEY, *Judge*.

**MEMORANDUM DECISION**

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

FALVEY, *Judge*: Lynn C. Hulsman, surviving spouse of Navy veteran Frederick S. Hulsman, appeals an April 18, 2019, Board of Veterans' Appeals decision that denied service connection for the cause of the veteran's death. This appeal is timely, the Court has jurisdiction to review the Board's decision, and single-judge disposition is appropriate. *See* 38 U.S.C. §§ 7252(a), 7266(a); *Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990).

We are asked to decide whether the Board erred in denying service connection for the cause of the veteran's death. As explained below, the law and undisputed facts show that the cause of the veteran's death qualifies for presumptive service connection. Thus, we will reverse the Board's decision and remand for VA to award service connection based on the veteran's exposure to herbicides while serving on the U.S.S. *Intrepid*.

**I. ANALYSIS**

Mr. Hulsman, who served on active duty from 1965 to June 1967, died of lung cancer in July 2010. His widow applied later that month for service connection for the cause of the veteran's death, but the regional office (RO) denied her claim in a November 2010 rating decision. In that decision, the RO found that the veteran died of lung cancer, a condition for which presumptive

service connection may be granted, and it found that he "served aboard the U.S.S. *Intrepid* in the waters off Vietnam from 1966 to 1967." R. at 336; *see* 38 C.F.R. § 3.309(e) (2019). Even so, the RO denied service connection because, under *Haas v. Peake*, 525 F.3d 1168 (Fed. Cir. 2008), veterans who served in waters offshore the landmass of Vietnam did not qualify for presumptive service connection.

The appellant appealed the RO's decision. For the next nine years, VA adjudicated her claim. In January 2019, while her case was pending, the Federal Circuit overruled *Haas* and held that those who served in the 12-nautical mile territorial sea of the Republic of Vietnam are entitled to presumptive service connection. *Procopio v. Wilkie*, 913 F.3d 1371, 1380-81 (Fed. Cir. 2019). The Federal Circuit explained that Mr. Procopio, who "served aboard the U.S.S. *Intrepid* from November 1964 to July 1967," was "in the territorial sea of Vietnam" in July 1966, when the *Intrepid* was deployed in the waters offshore the landmass of the Republic of Vietnam, including its territorial sea. *Id.* at 1374. Because Mr. Procopio suffered from a disability found in § 3.309(e) and because VA had confirmed that the *Intrepid* was in the offshore waters, the Federal Circuit reversed this Court's decision along with the underlying Board decision and ordered that service connection be granted. *Id.* at 1381. But you wouldn't know any of this from the April 2019 Board decision.

Instead of applying the Federal Circuit's *Procopio* decision and awarding service connection to Mr. Hulsman, Mr. Procopio's shipmate, under § 3.309(e), the Board denied service connection on a direct basis without considering presumptive service connection based on herbicide exposure. The Secretary tells us that this is because herbicide exposure in Vietnam never came up. But this argument is blind to the November 2010 RO decision that considered the applicability of Agent Orange presumptions. The Secretary also ignores that, at a March 2018 hearing, the veterans law judge brought up presumptive service connection and explored whether the veteran was exposed to herbicides. R. at 92-94. Herbicide exposure came up.

Because this issue was before the Board, it should have addressed it. *See Robinson v. Peake*, 21 Vet.App. 545, 552 (2008), *aff'd sub nom. Robinson v. Shinseki*, 557 F.3d 1335 (Fed. Cir. 2009). The Board's failure to do so is error. *Id.* Normally, this kind of error would lead to a remand to the Board to provide better reasons or bases for its decision. But this a case in which we are left with the definite and firm conviction that the Board erred in denying service connection, and so reversal is warranted. *See Deloach v. Shinseki*, 704 F.3d 1370, 1378-79 (Fed. Cir. 2013).

The only permissible view of the evidence goes against the Board's decision. *See Gutierrez v. Principi*, 19 Vet.App. 1, 10 (2004).

VA found that the veteran died of lung cancer—a disability that qualifies for presumptive service connection—and VA has found that, like Mr. Procopio, Mr. Hulsman was within the 12-nautical mile territorial sea of Vietnam. His cause of death qualifies for service connection. Thus, our resolution of this case dovetails with the result in *Procopio*. And so, we will reverse the Board decision and order that VA award service connection for lung cancer. *See Procopio*, 913 F.3d at 1381.

## **II. CONCLUSION**

For these reasons, the Board's April 18, 2019, decision is REVERSED and the matter is REMANDED for further proceedings.

DATED: May 14, 2020

Copies to:

Lynn C. Hulsman

VA General Counsel (027)