

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

MILDRED A. HEYER,)	
)	
Appellant)	
)	
v.)	No. 19-3430
)	
ROBERT L. WILKIE,)	
Secretary of Veterans Affairs,)	
)	
Appellee)	

MOTION FOR PANEL DECISION

Pursuant to U.S. Vet. App. R. 35(b), Appellant, Mildred A. Heyer, respectfully moves for the Court to submit her case for a panel decision. The Board of Veterans' Appeals (Board) issued a decision on January 25, 2019, in which it denied her claim for service connection for the cause of the death of veteran service member Foster L. Heyer. Ms. Heyer timely filed an appeal to this Court. On appeal, Ms. Heyer argued the Board failed to consider service connection for alcohol abuse as secondary to a traumatic brain injury (TBI) suffered from a 1973 service-connected automobile accident. The Court issued a single judge decision on March 28, 2020, in which it affirmed the Board's denial of the Appellant's claims for service connection.

In *Frankel v. Derwinski*, 1 Vet.App.23, 25-26 (1990) the Court held that a single judge disposition is only appropriate when the Court's decision:

1. does not establish a new rule of law;
2. does not alter, modify, criticize, or clarify an existing rule of law;

3. does not apply an established rule of law to a novel fact situation;
4. does not constitute the only recent, binding precedent on a particular point of law within the power of the Court to decide;
5. does not involve a legal issue of continuing public interest; and
6. the outcome is not reasonably debatable.

Here, in a single-judge decision the Court disagreed with Ms. Heyer's arguments that the veteran's alcohol abuse and cause of death was secondary to an in-service traumatic brain injury not previously considered by the Board of Veterans' Appeals (Board). Appellant believes the single judge decision overlooked points of law and misunderstood facts favorable to the Appellant. It is reasonably debatable that the theory of service connection for alcohol abuse as secondary to TBI from the 1973 motor vehicle accident was never associated with the claims file by the Board in any of its decisions. The memorandum decision for panel decision states, "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." Memo. Dec. at 2, *Heyer v. Wilkie*, Vet. App. No. 19-3430, (2020).

That the claims file record does or does not show a review by the Board of the TBI injury is reasonably debatable and whether a different outcome of the decision by the Board if service-connection for alcohol abuse were considered is reasonably debatable. Adding to this reasonably debatable outcome and supporting a remand to the Board is that the issue framed as entitlement to service connection for drug and alcohol abuse as secondary to service-connected TBI is absent from the claims file record. Thus, the Board never considered service-connection for the TBI injury and never considered the 1973 medical records to determine whether the probative and

competent medical evidence provides an etiologic relationship between service-connected TBI and the development of alcohol abuse.

Here, the single judge decision misunderstood and continued to rely upon the incompetent statement by a doctor summarizing the veteran's response to the doctor of why he drank made one day before his death, "...he got off on it and just could not stop." *See* September 15, 1982, VA medical record. RBA at 18-19. The statement by the doctor was unreliable for the Board and the Court to consider and use as evidence that the alcohol abuse was willful conduct and not proximately due to or the result of a service-connected TBI. By adopting the "... he got off on it and just could not stop...." statement the single judge decision overlooked and misunderstood the medical facts in this case, which are that the veteran made the statement one day before his death when he was delirious and disoriented in all four spheres, critically ill, hypotensive, bleeding, and undergoing hepatic failure with probable hepatic encephalopathy. The single judge decision by adopting the doctor's incompetent statement and relying upon a claims record absent of any mention of a review for service connection for alcohol abuse as secondary to TBI overlooked and misunderstood the points of law and fact important to this case to provide the benefit of the doubt to the claimant and disabilities that are proximately due to, or aggravated by, service-connected disease or injury are provided for under 38 U.S. Code § 5107 and 38 CFR § 3.310.

CONCLUSION

The April 28, 2020, single judge memorandum decision, which denied Appellant a remand back to the Board overlooked and misunderstood points of law and fact in Appellant's argument for entitlement to service connection for alcohol abuse as secondary to service-connected TBI. The single judge memorandum decision overlooked the law that the Court has

the jurisdictional authority to consider the TBI argument presented to it in the first instance and remand the matter back to the Board. In each and every claim for benefits by Ms. Heyer the Board failed to document whether it knew of, reviewed, discussed, considered, or associated the 1973 motor vehicle accident medical records resulting in service-connected TBI for its connection to the secondary alcohol abuse to the TBI that caused the veteran's death. Ms. Heyer respectfully requests the Court to consider her case for panel consideration and grant remand back to the Board for appropriate development and readjudication for entitlement to service connection for alcohol abuse as secondary to service-connected TBI.

DATED: May 18, 2020

Respectfully submitted,

MILDRED A. HEYER

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CERTIFICATE OF SERVICE

I hereby certify, to the best of my knowledge and ability, under penalty of perjury under the laws of the United States, that a copy of the foregoing was filed and served via electronic filing for the United States Court of Appeals for Veterans Claims and emailed to the following:

Mark A. Hamel, Esq.
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On this the 18th day of May, 2020.

By: /s/ Floyd R. Chapman
Floyd R. Chapman, Esq.