

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

SHERRY C. BENSON,
Appellant,

v.

DENIS MCDONOUGH,
Secretary of Veterans Affairs,
Appellee.

**BRIEF OF THE APPELLEE
SECRETARY OF VETERANS AFFAIRS**

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

SHERRY C. BENSON,)	
)	
Appellant,)	
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v.)	Vet. App. No. 18-6819
)	
DENIS MCDONOUGH,)	
Secretary of Veterans Affairs,)	
)	
Appellee.)	

**ON APPEAL FROM THE
BOARD OF VETERANS' APPEALS**

**BRIEF OF THE APPELLEE
SECRETARY OF VETERANS AFFAIRS**

I. ISSUE PRESENTED

The Board of Veterans' Appeals (Board or BVA) determined that Appellant is not entitled to recognition as the Veteran's surviving spouse for the purpose of receiving Department of Veterans Affairs (VA) Dependency and Indemnity Compensation (DIC) benefits because she and the Veteran were divorced in 1987. Should the United States Court of Appeals for Veterans Claims (Court) hold that the Board did not err as a matter of law?

II. STATEMENT OF THE CASE

A. Jurisdictional Statement

This Court has jurisdiction under 38 U.S.C. § 7252(a).

B. Nature of the Case

Appellant, Sherry C. Benson, appeals the Board's determination that she is not the Veteran's surviving spouse for the purpose of receiving DIC benefits. Record Before the Agency [R. at 1-8].

C. Statement of Facts

The Veteran, Charles C. Benson, served in the United States Army from September 1976 to October 1981. [R. at 687]. Appellant married Mr. Benson in July 1977. [R. at 610]. The record reflects that in February 1986, Mr. Benson shot Appellant. [R. at 490 (490-2)]. They divorced in 1987. [R. at 245 (244-51)]; [R. at 480 (480-3)]; [R. at 523 (523-6)]. Mr. Benson died on September 25, 2010. [R. at 264].

Appellant filed an application for DIC benefits in October 2010. [R. at 244-51]. The VA Regional Office denied her claim because she and the Veteran were divorced in 1987. [R. at 240-1]. Appellant appealed to the Board. [R. at 233-4]; [R. at 190-213]; [R. at 147-8]. In her substantive appeal, Appellant argued that although she was divorced, she had reasonable cause. [R. at 147 (147-8)].

In September 2017, the Board issued the decision on appeal. [R. at 1-8]. The Board stated:

Based on the uncontested fact of the appellant's divorce from the Veteran, however, there is not a basis for finding that the appellant remained the spouse for purpose of receiving VA benefits; the provision for separation from the Veteran due to

the misconduct of the Veteran pertains to separation and not divorce.

Id. at 6. The Board determined that “the criteria for establishing surviving spouse status are not met, and the appellant is not a proper claimant for the benefit sought.” *Id.*

III. SUMMARY OF THE ARGUMENT

The Court should affirm the Board's decision. Although the circumstances surrounding Appellant's divorce are sympathetic, she stopped being the Veteran's spouse once the divorce occurred. Because she was not the Veteran's spouse when he died, she is not his surviving spouse under the undisputed facts.

IV. ARGUMENT

A. The Issue on Appeal is a Question of Law that the Court Reviews De Novo

Because the facts are undisputed, the question on appeal only involves interpretations of statutes and regulations, which the Court reviews *de novo*. *Langdon v. Wilkie*, 32 Vet.App. 291, 296 (2020) (regulations); *Bo v. Wilkie*, 31 Vet.App. 321, 328 (2019) (statutes). The Secretary asserts that the plain language of any regulation discussed in this brief supports his argument, but should the Court determine that the regulations are genuinely ambiguous, the Secretary asserts that the Court should defer to the Secretary's interpretation because it is not plainly

erroneous or inconsistent with the regulations. *United Steel & Fasteners, Inc. v. United States*, 947 F.3d 794, 801 (Fed. Cir. 2020).

B. Appellant is not the Veteran's Surviving Spouse as a Matter of Law Because it is Undisputed that they Divorced in 1987

The Court should hold that Appellant is not the Veteran's surviving spouse because she was not his spouse when he died. A surviving spouse is eligible for VA benefits when a Veteran dies from a service-connected or compensable disability. 38 U.S.C. § 1310(a). VA defines a surviving spouse is, *inter alia*, a person "whose marriage to the veteran meets the requirements of § 3.1(j) and who was the spouse of the veteran at the time of the veteran's death." 38 C.F.R. § 3.50(b). A spouse is a person who is a Veteran's wife or husband. 38 U.S.C. § 101(31). A person stops being a Veteran's spouse after a divorce. See *Marrero v. Gober*, 14 Vet.App. 80, 82 (2000) (holding that the claimant was not the Veteran's spouse after their divorce). The record shows, and Appellant does not dispute, that she and the Veteran divorced in 1987. [R. at 245 (244-51)]. Therefore, under the undisputed facts, Appellant was not the Veteran's surviving spouse as a matter of law because her divorce meant she was not his spouse when he died. 38 C.F.R. § 3.50(b). To grant spousal benefits, as Appellant requests, to a Veteran's former spouse following a divorce, is beyond the Secretary's authority because such an

award would conflict with the plain meaning of the statute passed by Congress. 38 U.S.C. § 101(31).

Appellant argues that the Board misapplied the provisions of 38 C.F.R. § 3.50(b). (Appellant's Brief (App. Br.) at 2-3). She argues that she should not have been required to remain married to the Veteran because he had tried to kill her, and that the Board should have found that she is a surviving spouse under section 3.50(b). *Id.* Section 3.50(b) provides that a surviving spouse is someone who "was the spouse of the veteran at the time of the veteran's death and" who lived with the veteran continuously during the marriage "except where there was a separation which was due to the misconduct of, or procured by, the veteran without the fault of the spouse" and except under certain circumstances, has not remarried or held himself or herself out as the spouse of another person. 38 C.F.R. § 3.50(b).

The Secretary construes Appellant's argument to mean that she is the Veteran's surviving spouse because the divorce was the Veteran's fault and because she has not remarried. (App. Br. at 2-3). The Secretary is sympathetic to Appellant and the reasons for her divorce, but whether the divorce was the Veteran's fault is immaterial. The "fault" provisions of section 3.50(b)(1) only apply to married couples who were separated at the time of the Veteran's death. 38 C.F.R. § 3.50(b)(1). The provisions in the regulation regarding claimants who have "not remarried" do not apply to

Appellant because she and the Veteran were divorced. *Id.* § 3.50(b)(2). Therefore, the Court should affirm the Board's decision because Appellant and the Veteran were divorced when he died, so she cannot be his surviving spouse as a matter of law.

CONCLUSION

For the foregoing reasons, the Court should affirm the Board's decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On March 26, 2021, a copy of the foregoing was mailed postage prepaid to:

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I hereby certify, under penalty of perjury under the laws of the United States, that the foregoing is true and correct:

/s/ Brent Bowker

BRENT BOWKER

Appellate Attorney