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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 18-6819

SHERRY C. BENSON, APPELLANT,

v.

DENIS McDONOUGH,
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*: Self-represented appellant Sherry C. Benson attempts to prove she is the surviving spouse of veteran Charles R. Benson, who served the Nation honorably in the United States Army from September 1976 to October 1981.¹ In this appeal, which is timely and over which we have jurisdiction,² appellant contests a September 26, 2017, decision of the Board of Veterans' Appeals that denied her entitlement to recognition as the veteran's surviving spouse for the purpose of receiving dependency and indemnity compensation (DIC) benefits. On June 4, 2020, a panel of this Court issued a precedential decision determining that appellant's Notice of Appeal was timely filed and allowing her appeal to proceed.³

Now before the Court are the merits of her appeal. Because the Board's decision is based on the correct law, does not contain clearly erroneous factual findings, and is supported by an adequate statement of reasons or bases, we will affirm.

¹ Record (R.) at 687.

² See 38 U.S.C. §§ 7252(a), 7266(a).

³ *Benson v. Wilkie*, 32 Vet.App. 381 (2020).

I. ANALYSIS

Because appellant is proceeding pro se, she is entitled to both a sympathetic reading of her informal brief and a liberal construction of her argument.⁴ But she still bears the burden of demonstrating error on appeal in the Board's decision.⁵ Here, appellant generally contends that the Board erred in denying her recognition as the veteran's surviving spouse. She admits she was not married to the veteran at the time of his death but suggests this should not prevent her recognition as a surviving spouse because she left the veteran because he tried to kill her. The Secretary defends the Board's decision in full and urges affirmance.

A "surviving spouse" generally is a person⁶ (1) who was validly married to the veteran at the time of the veteran's death and had been married to the veteran for 1 year before the veteran's death; (2) "who lived with the veteran continuously from the date of marriage to the date of the veteran's death (except where there was separation which was due to the misconduct of, or procured by, the veteran without the fault of the spouse)"; and (3) "who has not remarried or . . . lived with another person and held himself or herself out openly to the public to be the spouse of such other person."⁷

Whether a claimant is the surviving spouse of a deceased veteran is a question of fact that the Court reviews for clear error.⁸ A finding of fact is clearly erroneous when the Court, after reviewing the entire evidence, "is left with the definite and firm conviction that a mistake has been committed."⁹ However, the Court reviews legal questions de novo.¹⁰ As with all its findings of fact and law, the Board is required to include in its decision a written statement of the reasons or bases for its findings and conclusions on all material issues of fact and law that is adequate to enable an

⁴ *Comer v. Peake*, 552 F.3d 1362, 1369-70 (Fed. Cir. 2009); *see also De Perez v. Derwinski*, 2 Vet.App. 85, 86 (1992).

⁵ *See* 38 U.S.C. § 7261(b)(2); *Shinseki v. Sanders*, 556 U.S. 396, 409 (2009).

⁶ Although both the statute and regulations dealing with this question provide that a "surviving spouse" must be "a person of the opposite sex," VA quite correctly no longer enforces this unconstitutional requirement. *See Obergefell v. Hodges*, 576 U.S. 644 (2015); *see also Cardona v. Shinseki*, 26 Vet.App. 472 (2014).

⁷ 38 U.S.C. § 101; *see* 38 C.F.R. § 3.50(b) (2020).

⁸ *See* 38 U.S.C. § 7261(a)(4); *see also Dedicatoria v. Brown*, 8 Vet.App. 441, 443 (1995); *Badua v. Brown*, 5 Vet.App. 472, 473 (1993).

⁹ *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948); *see also Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990).

¹⁰ *See Butts v. Brown*, 5 Vet.App. 532, 538 (1993) (en banc).

appellant to understand the precise basis for the Board's decision, as well as facilitate informed review in this Court.¹¹

In the decision on appeal, the Board found that the veteran and appellant were divorced in 1987 and remained divorced at the time of the veteran's death in 2010. The Board acknowledged that the veteran shot appellant and that they subsequently divorced. However, the Board found that because it is "uncontested" that appellant and the veteran were divorced, "there is not a basis for finding that the appellant remained the spouse for purposes of receiving VA benefits."¹²

The Board did not err because it correctly applied the law governing surviving spouses. The Board began its analysis with the bedrock principle that there must be a "marriage" between the veteran and appellant.¹³ Appellant does not contest that she and the veteran divorced in 1987. Unfortunately, despite her sympathetic circumstances, the law simply does not allow for her recognition as a surviving spouse of the veteran.

Appellant asks the Court to apply § 3.50(b), which provides exceptions for separations that are the veteran's fault. However, these exceptions apply to *separations* and not *divorces*. Appellant was not separated from the veteran but legally divorced. Thus, these provisions do not apply.

In sum, there is simply no basis in the law to provide for appellant's recognition as the veteran's surviving spouse, no matter how sympathetic her circumstances. Her divorce from the veteran in 1987 bars the recognition she seeks. Thus, we will affirm the Board's decision.

II. CONCLUSION

After consideration of the parties' briefs, the governing law, and the record, the Court AFFIRMS the September 26, 2017, Board decision.

DATED: June 1, 2021

Copies to:

Sherry C. Benson

VA General Counsel (027)

¹¹ See 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *Gilbert*, 1 Vet.App. at 55-57.

¹² R. at 6.

¹³ *Id.*; see 38 U.S.C. §§ 101, 103(c); see 38 C.F.R. §§ 3.1(j), 3.50(b).