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On appeal from the
Department of Veterans Affairs Regional Office in Atlanta, Georgia

THE ISSUE

1. Whether new and material evidence has been received to reopen the previously denied claim of service connection for the cause of the Veteran's death.

2. Whether new and material evidence has been received to reopen the previously denied claim of entitlement to Dependency and Indemnity Compensation (DIC) pursuant to the provisions of 38 U.S.C.A. § 1318 (West 2002).

3. Whether new and material evidence has been received to reopen the previously denied claim of entitlement to DIC under 38 U.S.C.A. § 1151.

REPRESENTATION

Appellant represented by: Chuck A. Pardue, Attorney at Law
WITNESS AT HEARING ON APPEAL

The appellant

ATTORNEY FOR THE BOARD

M. Donohue, Counsel

INTRODUCTION

The Veteran had active service from August 1968 to September 1970. He died in January 2002. The appellant is claiming as the Veteran's surviving spouse.

This matter initially arose before the Board of Veterans' Appeals (Board) on appeal of a May 2011 rating decision by the RO.

In January 2013, the appellant testified at a hearing conducted by the undersigned Veterans Law Judge. A transcript of the hearing has been associated with the Veteran's VA claims folder.

While the May 2011 rating decision listed the issue under consideration as whether new and material evidence had been received to reopen the claim for service connection for the cause of the Veteran's death, the decision included an analysis of eligibility to DIC under § 1318 and § 1151. These issues were further addressed in the statement of the case and during the January 2013 hearing. As a result, the Board has recharacterized the issue as noted on the title page.

As discussed in further detail in the following decision, the Board finds that new and material evidence sufficient to reopen the previously denied claim of service connection for the cause of the Veteran's death has been received.

1. The Veteran died in January 2002.

2. At the time of the Veteran's death, service connection was in effect for posttraumatic stress disorder (PTSD). A 100 percent disability rating was in effect from February 18, 1992.

3. The Veteran's death certificate shows that he died in January 2002 at age 59. The immediate cause of death was listed as metastatic rectal cancer. No conditions giving rise to the immediate cause of death, or other significant conditions which contributed to death, were listed.

4. In a January 2005 rating decision, the RO denied service connection for the cause of the Veteran's death and entitlement to DIC benefits under 38 U.S.C.A. § 1151 and § 1318. The appellant did not appeal the decision, and evidence or information relevant to these issues was not received within the following year.

5. Evidence received since the last final denial of entitlement to DIC benefits pursuant to 38 U.S.C.A. § 1318 does not relate to an unestablished element of that claim.

6. Evidence received since the last final denial of entitlement to DIC benefits pursuant to 38 U.S.C.A. § 1151 does not relate to an unestablished element of that claim.

7. Recently received evidence indicating the Veteran's was refusing to undergo cancer treatment as a result of his service-connected PTSD is not cumulative and relates to an unestablished fact.

CONCLUSIONS OF LAW

1. The January 2005 rating decision is final. 38 U.S.C.A. § 7105 (West 2002); 38 C.F.R. §§ 3.160(d), 20.200, 20.201, 20.302, 20.204, 20.1103 (2013).

2. New and material evidence has not been received to reopen the claim for DIC benefits pursuant to the provisions of 38 U.S.C.A. § 1318. 38 U.S.C.A. § 5108 (West 2002); 38 C.F.R. § 3.156 (2013).

3. New and material evidence has not been received to reopen the claim for DIC benefits pursuant to the provisions of 38 U.S.C.A. § 1151. 38 U.S.C.A. § 5108 (West 2002); 38 C.F.R. § 3.156 (2013).

4. New and material evidence has been received since the prior denial of service connection for the cause of the Veteran's death such that the claim is reopened. 38 U.S.C.A. § 5108 (West 2002); 38 C.F.R. § 3.156 (2013).

REASONS AND BASES FOR FINDINGS AND CONCLUSIONS

VA has a duty to notify and assist claimants in substantiating claims for VA benefits. See, e.g., 38 U.S.C.A. §§ 5103, 5103A (West 2002); 38 C.F.R. § 3.159 (2013). The RO provided the required notice in a letter sent to the appellant in April 2011. This letter informed the appellant of what evidence was required to substantiate her claims and of her and VA's respective duties for obtaining evidence.

The letter also informed the appellant that her claim had previously been denied and that in order to reopen the claim she would need to submit new and material evidence. The language contained in this letter substantially follows the regulatory language of 38 C.F.R. § 3.156 and complied with the holding of the Court in Kent v. Nicholson, 20 Vet.App. 1 (2006).

While the April 2011 notice letter erroneously notified the appellant that the service connection had not been established for any disability at the time of the Veteran's death, this error has not resulted in any prejudice. Specifically, the appellant has demonstrated actual knowledge that the Veteran had been granted service connection

elements (4) and (5), degree of disability and effective date, are rendered moot via the Board's denial of the claim on appeal. In other words, any lack advisement as to those two elements is meaningless, because a disability rating and effective date are not assigned.

The appellant's claim was denied based on element (3), a connection between the Veteran's service and his death. As explained, she has received proper notice as to her obligations and those of VA, with respect to this crucial element in the above-mentioned VCAA letter which informed her of what the evidence must show.

With respect to the duty to assist, the Board finds that all necessary development has been accomplished and appellate review may proceed without prejudice to the appellant. Specifically, the record contains the Veteran's VA treatment records, lay statements, internet articles and the hearing transcript.

During the January 2013 hearing, the undersigned Veterans Law Judge clarified the issues on appeal, explained the concept of new and material evidence, identified an evidentiary deficit, and suggested the submission of additional evidence to support the appellant's claim. The Veterans Law Judge also left the record open for a 30-day period following the hearing to allow for the submission of such additional evidence. The actions of the VLJ supplement the VCAA and comply with any related duties owed during a hearing. 38 C.F.R. ง 3.103.

Based on the foregoing, the Board finds that all relevant facts have been properly and sufficiently developed in this appeal and that no further development is required to comply with the duty to assist the appellant in developing the facts pertinent to her claim.

I. Law and Regulations

In general, RO rating decisions that are not timely appealed are final. See 38 U.S.C.A. ง 7105 (West 2002); 38 C.F.R. ง 20.1103 (2013). Pursuant to 38 U.S.C.A. ง 5108, a finally disallowed claim may be reopened when new and material evidence is presented or secured with respect to that claim.

New evidence means existing evidence not previously submitted to agency decision makers. Material evidence means existing evidence that, by itself or when considered with previous evidence of record, relates to an unestablished fact necessary to substantiate the claim.

Evidence that is merely cumulative of other evidence in the record cannot be new and material even if that evidence had not been previously presented to the Board. Anglin v. West, 203 F.3d 1343 (Fed. Cir. 2000). New and material evidence can be neither cumulative nor redundant of the evidence of record at the time of the last prior final denial of the claim sought to be reopened, and must raise a reasonable possibility of substantiating the claim. 38 C.F.R. ง 3.156(a) (2013).

For the purpose of establishing whether new and material evidence has been received, the credibility of the evidence, although not its weight, is presumed. Justus v. Principi, 3 Vet. App. 510, 513 (1992).

The death of a veteran will be considered as having been due to a service-connected disability where the evidence establishes that such disability was either the principal or contributory cause of death. 38 C.F.R. ง 3.312(a).

A principal cause of death is one which, singularly or jointly with some other condition, was the immediate or underlying cause of death, or was etiologically related thereto. 38 C.F.R. ง 3.312(b). A contributory cause of death is one which contributes substantially or materially to death, or aided or lent assistance to the production of death. 38 C.F.R. ง 3.312(c).

Pursuant to 38 U.S.C.A. ง 1318(a), benefits are payable to the surviving spouse of a "deceased veteran" in the same manner as if the death were service connected. A "deceased veteran" for purposes of this provision is a veteran who dies not as the result of the veteran's own willful misconduct and who at death was either in receipt of compensation or entitled to receive compensation for service-connected disabilities rated totally disabling. 38 U.S.C.A. ง 1318(b); 38 C.F.R. ง 3.22(a).

The veteran's service-connected disabilities must have been either continuously rated totally disabling for ten or

treatment provided by a VA employee or in a VA facility is entitled to compensation for the additional disability "in the same manner as if such additional disability ... were service-connected" if the additional disability was not the result of wilful misconduct and was proximately caused by "carelessness, negligence, lack of proper skill, error in judgment, or similar instance of fault on the part of [VA] in furnishing" that treatment or "an event not reasonably foreseeable." 38 U.S.C. § 1151(a)(1)(A), (B); Viegas v. Shinseki, 705 F.3d 1374, 1377-78 (Fed.Cir.2013).

II. Analysis

The RO denied the appellant's claim for service connection for the cause of the Veteran's death and entitlement to DIC under §§ 1151, 1318 in a January 2005 rating decision. The appellant was provided notice of this decision and her appeal rights in a January 21, 2005 letter, but did not perfect a timely appeal of that denial. Moreover, no new and material evidence pertaining to the appellant's claims was associated with the claims file within one year of the RO's decision.

The January 2005 rating decision is final. See 38 U.S.C.A. § 7105 (West 2002); 38 C.F.R. § 3.104, 20.1103 (2013). As explained, the appellant's claims may only be reopened if new and material evidence is received. See 38 U.S.C.A. § 5108 (West 2002); 38 C.F.R. § 3.156 (2013); see also Barnett v. Brown, 83 F.3d 1380, 1383 (Fed. Cir. 1996). Therefore, the Board's inquiry will be directed to the question of whether any additionally received evidence (i.e., since January 2005) is new and material.

When the appellant's claim was denied in January 2005, the record contained the Veteran's service treatment records, post-service medical records, his death certificate, and a stipulation agreement from a claim against VA arising out of the Federal Tort Claims Act.

Based on this evidence, the RO denied the appellant's claim under § 1318 because the Veteran had not been rated totally disabled for a period of 10 years or more prior to his death. Entitlement to DIC under § 1151 was denied because the evidence did not show that VA medical or educational services were the proximate cause of the Veteran's death. The January 2005 rating decision also denied service connection for the cause of the Veteran's death since there was "no evidence showing that the Veteran died from conditions which were related to his military service."

The evidence associated with the claims file since January 2005 includes the January 2013 hearing transcript, multiple lay statements, articles from the internet, and copies of the appellant's marriage certificate and divorce proceedings.

With respect to the issue of entitlement to DIC benefits under § 1318, the Veteran was in receipt of a 100 percent disability evaluation for PTSD for less than 10 years preceding his death. The evidence associated with the claims file following the January 2005 rating decision does not suggest otherwise. Indeed, during the January 2013 hearing, the appellant acknowledged that Veteran had not received a total disability rating for 10 years or more prior to his death. See the hearing transcript, page 12.

Thus, the evidence received since the January 2005 rating decision does not relate to an unestablished fact necessary to substantiate the claim for entitlement to DIC under 38 U.S.C.A. § 1318. The evidence is not new and material. Accordingly, the Board finds that the claim for DIC benefits under § 1318 is not reopened.

With respect to the appellant's claim for DIC benefits under 38 U.S.C.A. § 1151, during the hearing, the appellant testified that VA failed to timely diagnose and treat the Veteran's rectal cancer. Upon review, however, these statements are cumulative and redundant of evidence that was of record at the time of the January 2005 rating decision. See Reid v. Derwinski, 2 Vet. App. 312, 315 (1992) (explaining testimony concerning how the claimant's ankle was injured was not new as the Veteran made that assertion many years earlier).

Specifically, prior to the January 2005 rating decision, the appellant submitted allegations of her husband's wrongful death to VA in a copy of the claim she filed under the Federal Torts Claim Act. In this claim, the appellant specifically argued that the staff at the VA Medical Center (MC) in Augusta, Georgia negligently diagnosed and treated her husband's colon cancer.

Thus, the additional evidence received since the January 2005 rating decision does not relate to an unestablished fact necessary to substantiate the claim for DIC benefits under 38 U.S.C.A. ง 1151. The evidence and argument are cumulative rather than new and material. Accordingly, the Board finds that the claim for DIC benefits under 38 U.S.C.A. ง 1151 is not reopened.

Notwithstanding the above, the Board notes that the Settlement Agreement reached between the appellant and VA in her Federal Torts Claim Act provided the following:

The parties do hereby agree to settle in compromise each and every claim of any kind, whether known or unknown, arising directly or indirectly from the acts or omissions that gave rise to the administrative claims, e.g., failure of the Augusta VAMC to timely diagnose [the Veteran's] colon cancer, under the terms and conditions set forth in this Stipulation for Compromise Settlement (Stipulation)

The United States of America agrees to pay [an amount which] shall be in full settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damages to property and the consequences thereof, resulting, and to result, from the subject matter of this settlement, including any claims for wrongful death, for which claimants or their guardians, heirs, executors, administrators, or assigns, and each of them, now have or may hereafter acquire against the United States of America, its agents, servants, and employees.

The record indicates that the stipulation agreement was signed by the appellant, her current attorney, and a representative of VA Regional Counsel.

During the January 2013 hearing, the appellant's attorney appeared to acknowledge that the stipulation agreement addressed the appellant's ง 1151 claim and suggested that he would be providing additional argument on this matter. See the hearing transcript, page 5. Upon review, however, no additional argument was received.

At this juncture, the Board does not make any determination regarding the legal impact of the stipulation agreement on the appellant's claim for DIC under 38 U.S.C.A. ง 1151.

With respect to the claim for service connection for the cause of the Veteran's death, in January 2005, the RO denied the appellant's claim because there was "no evidence showing that the Veteran died from conditions which were related to his military service."

During the January 2013 hearing, the appellant testified that the Veteran's service-connected PTSD was interfering with his medical treatment and hastened his death. Specifically, the appellant testified that the Veteran "became more and more delusional" prior to his death and would refuse his cancer treatment because he believed someone was trying to kill him. See the hearing transcript, pages 12-13.

In addition, the appellant submitted several lay statements from the Veteran's friends and family members which note that he experienced delusions and difficulty with his memory which prevented him from taking his medication or seeking medical treatment.

This evidence is new and material because it relates to an unestablished fact necessary to substantiate the claim, namely, that the Veteran's PTSD may have interfered with his treatment for colon cancer.

As the new evidence is neither cumulative nor redundant, the claim is reopened. See 38 C.F.R. ง 3.156 (2013).

The reopened claim of service connection for the cause of the Veteran's death will be addressed further hereinbelow.

ORDER

The application to reopen the claim for entitlement to entitlement to DIC under 38 U.S.C.A. ง 1318 is denied

REMAND

The Veteran's death certificate cites the cause of death as metastatic rectal cancer. At the time of his death, the Veteran was in receipt of 100 percent disability rating for PTSD.

VA treatment records prior to the Veteran's death document that he failed to report for treatment, was not taking his medication correctly, and was discharged based on his unauthorized absence.

During the January 2013 hearing and in multiple lay statements, the Veteran's friends and family have indicated that his mental health disability resulted in the Veteran's noncompliance with treatment and hastened his death.

Consequently, this issue contains certain questions which cannot be answered by the Board. See Colvin v. Derwinski, 1 Vet.App. 171, 175 (1991) (the Board is prohibited from exercising its own independent judgment to resolve medical questions).

These questions concern whether the Veteran's PTSD substantially or materially contributed to his death. See Charles v. Principi, 16 Vet.App. 370 (2002); see also 38 C.F.R. ง 3.159(c)(4) (2013) (a medical examination or opinion is necessary if the information and evidence of record does not contain sufficient competent medical evidence to decide the claim).

Accordingly, the case is REMANDED for the following action:

1. The AOJ should arrange for an appropriate health care provider to review the Veteran's claims file and provide an opinion as to whether it is as least as likely as not (50 percent probability or greater) that the Veteran's PTSD caused, materially contributed to, or hastened his death?

A clear rationale for all opinions would be helpful and a discussion of the facts and medical principles involved would be of considerable assistance to the Board.

2. If any benefit sought remains denied, the Appellant and her representative should be provided a supplemental statement of the case and an appropriate period of time for response. The case should then be returned to the Board, if in order.

The appellant has the right to submit additional evidence and argument on the matter the Board has remanded. Kutscherousky v. West, 12 Vet. App. 369 (1999).

This claim must be afforded expeditious treatment. The law requires that all claims that are remanded by the Board or by the United States Court of Appeals for Veterans Claims for additional development or other appropriate action must be handled in an expeditious manner. See 38 U.S.C.A. งง 5109B, 7112 (West Supp. 2013).

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H. N. SCHWARTZ
Veterans Law Judge, Board of Veterans' Appeals

Department of Veterans Affairs