UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 16-3570

LAUREL J. BAILEY, APPELLANT,

V.

PETER O'ROURKE,
ACTING SECRETARY OF VETERANS AFFAIRS, APPELLEE.

On Appeal from the Board of Veterans' Appeals

(Decided July 3, 2018)

Jill C. Davenport, of Washington, D.C., for the appellant.

Meghan Flanz, Interim General Counsel; *Mary Ann Flynn*, Chief Counsel; *James B. Cowden*, Deputy Chief Counsel; and *Timothy G. Joseph*, Appellate Attorney, all of Washington, D.C., were on the brief for the appellee.

Before PIETSCH, ALLEN, and TOTH, *Judges*.

PIETSCH, *Judge*, filed the opinion of the Court.

PIETSCH, *Judge*: Laurel J. Bailey appeals through counsel a July 8, 2016, Board of Veterans' Appeals (Board) decision that, among other dispositions, denied the veteran, Bill E. Bailey, entitlement to VA benefits for a brain tumor, including as secondary to Agent Orange exposure.[1] This appeal is timely and the Court has jurisdiction to review the Board's decision pursuant to 38 U.S.C. §§ 7252(a) and 7266(a). On March 22, 2018, this case was referred to a panel of the Court to address an issue of first impression, whether a spouse's remarriage bars his or her right to accrued benefits pursuant to 38 U.S.C. § 5121.

[1]The Board granted entitlement to VA benefits for bilateral hearing loss and tinnitus, and Mrs. Bailey asks the Court not to disturb those findings. *See Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007).

I. BACKGROUND

Mr. Bailey served on active duty in the U.S. Army from June 1968 to January 1970, including service in Vietnam. Based on his service, he is presumed to have been exposed to Agent Orange. In 2008, Mr. Bailey's doctor noted that he had a 5-centimeter mass in the right frontal lobe of his brain, which was diagnosed as an anaplastic mixed glioma in October 2009.

In March 2010, Mr. Bailey filed a claim for VA benefits for anaplastic mixed glioma, for which he underwent a VA examination in June 2010. At that examination, he reported being exposed to Agent Orange while in Vietnam. The examiner performed a physical examination, chemical and blood tests, and a skull x-ray. The examiner opined that Mr. Bailey's anaplastic mixed glioma was "less likely as not caused by his active military service during his exposure to the herbicide Agent Orange in Vietnam." Record (R.) at 435. In support, the examiner noted that "there is no validation that this brain cancer per se is related to his exposure to Agent Orange." *Id*. The examiner stated that the medical literature did not show an "association with this type of brain tumor being an anaplastic mixed glioma related to exposure to Agent Orange." *Id*.

A VA regional office denied Mr. Bailey's claim in August 2010. Mr. Bailey disagreed with that decision and submitted three articles in support of his claim, including an article from the *Merck Manual* discussing brain tumors generally, an article from the American Cancer Society addressing soft tissue sarcoma, and an article from the International RadioSurgery Association (IRSA) on astrocytomas, which noted that "[p]eople exposed to certain chemicals, such as petrochemicals, pesticides and formaldehyde, appear to be at higher risk of developing a malignant brain tumor than those who are not exposed." R. at 503.

On April 4, 2012, Mr. Bailey died as a result of cerebral edema due to recurrent brain cancer. After his death, Mrs. Bailey requested that VA continue her husband's claim and was substituted as the claimant in the appeal.

In May 2016, Mrs. Bailey submitted two articles in support of her appeal, including an article from *Science Daily* titled "Dioxin-like chemical messenger makes brain tumors more aggressive," and one from *Toxicological Sciences*, titled "Role of the Aryl Hydrocarbon Receptor in Carcinogenesis and Potential as a Drug Target." R. at 76-80, 81-109. She argued that Mr. Bailey was

exposed to dioxins in Vietnam, which contribute to aggressive growth of tumors and deaths from those tumors.

On July 8, 2016, the Board issued the decision on appeal, noting that anaplastic mixed glioma was not a condition presumed by the Secretary to be related to exposure to Agent Orange. As to direct service connection, the Board found that, although the articles submitted by Mr. and Mrs. Bailey had some probative value, they were outweighed by the June 2010 VA medical opinion, which was specific to Mr. Bailey's case.

On October 21, 2016, Mrs. Bailey appealed the July 2016 Board decision to the Court. On July 25, 2017, while her appeal was pending, she notified the Court that she had remarried on May 20, 2017.

On January 18, 2018, the Court requested supplemental briefing regarding the nature of the claims on appeal and what impact, if any, Mrs. Bailey's remarriage has on her appeal. In response, both parties agreed that the only claim on appeal is entitlement to accrued benefits and that Mrs. Bailey's remarriage should have no impact on her ability to pursue this claim.

II. ANALYSIS

A. Remarriage

The first question in statutory interpretation is always "whether Congress has directly spoken to the precise question at issue." *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842 (1984). "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id*. at 842-43.

Substitution for the purpose of pursuing accrued benefits is governed by 38 U.S.C. § 5121A. Under that provision,

> If a claimant dies while a claim for any benefit under a law administered by the Secretary, or an appeal of a decision with respect to such a claim, is pending, a living person who would be eligible to receive accrued benefits due to the claimant under section 5121(a) of this title may, not later than one year after the date of the death of such claimant, file a request to be substituted as the claimant for the purposes of processing the claim to completion.

38 U.S.C. § 5121A(a)(1). "Those who are eligible to make a claim under this section shall be determined in accordance with section 5121 of this title." 38 U.S.C. § 5121A(b).

Pursuant to 38 U.S.C. § 5121,

> (a) Except as provided in section 3329 and 3330 of title 31, periodic monetary benefits (other than insurance and servicemen's indemnity) under laws administered by the Secretary to which an individual was entitled at death under existing ratings or decisions or those based on evidence in the file at date of death (hereinafter in this section and section 5122 of this title referred to as "accrued benefits") and due and unpaid, shall, upon the death of such individual be paid as follows:
>
> > (1) Upon the death of a person receiving an apportioned share of benefits payable to a veteran, all or any part of such benefits to the veteran or to any other dependent or dependents of the veteran, as may be determined by the Secretary.
> >
> > (2) Upon the death of a veteran, to the living person first listed below:
> >
> > > (A) The veteran's spouse.
> > >
> > > (B) The veteran's children (in equal shares).
> > >
> > > (C) The veteran's dependent parents (in equal shares).
> >
> > (3) Upon the death of a widow or remarried surviving spouse, to the children of the deceased veteran.
> >
> > (4) Upon the death of a child, to the surviving children of the veteran who are entitled to death compensation, dependency and indemnity compensation, or death pension.
> >
> > (5) Upon the death of a child claiming benefits under chapter 18 of this title, to the surviving parents.
> >
> > (6) In all other cases, only so much of the accrued benefits may be paid as may be necessary to reimburse the person who bore the expense of last sickness and burial.

38 U.S.C. § 5121(a).

The questions at issue in this case are "What does the term spouse mean under section 5121(a)?" and "When is status as a spouse determined?". Congress specifically and unambiguously answered both of these questions.

"Spouse" has been defined as "a person of the opposite sex who is a wife or husband."[2] 38 U.S.C. § 101(31). This definition differs from that of a surviving spouse, which

> means (except for purposes of chapter 19 of this title [38 U.S.C.S §§ 1901 et seq.]) a person of the opposite sex who was the spouse of a veteran at the time of the veteran's death, and who lived with the veteran continuously from the date of marriage to the date of the veteran's death (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 who has not remarried or (in cases not involving remarriage) has not since the death of the veteran, and after September 19, 1962, lived with another person and held himself or herself out openly to the public to be the spouse of such other person.

38 U.S.C. §101(3). By using the term "spouse" in section 5121(a), as opposed to the term "surviving spouse," Congress excluded any disqualification from accrued benefits as a result of remarriage in this context. 38 U.S.C. § 5121(a)(2)(A); *see Heino v. Shinseki*, 683 F.3d 1372, 1379 (Fed. Cir. 2012) ("It is well settled that '[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purportedly in the disparate inclusion or exclusion.'" (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983))).

In section 5121, Congress also specifically stated that eligibility to accrued benefits is a determination made "upon the death of the veteran." 38 U.S.C. § 5121(a)(2). In *Sucic v. Shinseki*, the Court held that "[i]t is clear from the plain language of the statute that to qualify as an accrued benefits beneficiary, an individual must satisfy the requirements of the statutory framework for these benefits when the veteran dies as opposed to at some point during the pendency of the veteran's claim." 29 Vet.App. 121, 125 (2017). In support, the Court noted that the United States Court of Appeals for the Federal Circuit reached the same conclusion when it held that "[b]ecause the status of a potential substitute is not static, eligibility to substitute can be conclusively determined only at

[2]The language in the statute pertaining to "the opposite sex" has no bearing on the ultimate resolution in this case. However, the Court notes that VA no longer enforces that language in the statute. *See Cardona v. Shinseki*, 26 Vet.App. 472, 481 (2014) (per curiam order).

the time of the claimant's death." *Id*. (quoting *Nat'l Org. of Veterans Advocates, Inc. (NOVA) v. Sec'y of Veterans Affairs*, 809 F.3d 1359, 1362 (Fed. Cir. 2016)).

Accordingly, the plain language of the statute makes clear that eligibility for accrued benefits for a spouse is determined on the date the veteran died. Because Mrs. Bailey was the spouse of Mr. Bailey at the time of his death, she became eligible for accrued benefits at that time. *See* 38 U.S.C. § 5121(a)(2)(A). We hold that remarriage does not affect a pending claim for accrued benefits. Thus, Mrs. Bailey's appeal may continue.

B. June 2010 Medical Opinion

As to the merits of the appeal, Mrs. Bailey argues that the Board erred by relying on an inadequate medical opinion. Specifically, she argues that the June 2010 VA medical opinion was internally inconsistent, was based on an inaccurate factual premise, and did not contain sufficient rationale. She also contends that the Board's reasons or bases for discounting the medical treatise evidence in favor of the June 2010 opinion are inadequate.

The Secretary has a duty to assist claimants in developing their claims, including, in appropriate cases, "providing a medical examination or obtaining a medical opinion when such an examination or opinion is necessary to make a decision on the claim." 38 U.S.C. § 5103A(d). "Once the Secretary undertakes the effort to provide an examination when developing a service-connection claim, . . . he must provide an adequate one." *Barr v. Nicholson*, 21 Vet.App. 303, 311 (2007).

A medical examination is considered adequate "where it is based upon consideration of the veteran's prior medical history and examinations and also describes the disability, if any, in sufficient detail so that the Board's 'evaluation of the claimed disability will be a fully informed one.'" *Stefl v. Nicholson*, 21 Vet.App. 120, 123 (2007) (quoting *Ardison v. Brown*, 6 Vet.App. 405, 407 (1994)). In *Stefl*, the Court clarified that "[t]he availability of presumptive service connection for some conditions based on exposure to Agent Orange does not preclude direct service connection for other conditions based on Agent Orange exposure." *Id.*; *see also Polovick v. Shinseki*, 23 Vet.App. 48, 52-53 (2009).

"Whether a medical opinion is adequate is a finding of fact, which the Court reviews under the 'clearly erroneous' standard." *D'Aries v. Peake*, 22 Vet.App. 97, 104 (2008). 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." *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948); *Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990). As always, the Board must provide a statement of the reasons or bases for its determination, adequate to enable an appellant to understand the precise basis for the Board's decision as well as to facilitate review in this Court. 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *Gilbert*, 1 Vet.App. at 56-57.

The June 2010 medical examiner interviewed and examined Mr. Bailey. However, the rationale for his opinion was only general in nature. The entire opinion consisted of the following:

> [T]here is no validation that this brain cancer per se is related to his exposure to Agent Orange. It is the opinion in the review of medical literature that there has been no association with this type of brain tumor being an anaplastic mixed glioma related to exposure to Agent Orange that has been discussed in the medical literature. Therefore, it is the opinion of the undersigned that his brain glioma is unrelated to his exposure to Agent Orange.

R. at 435. The examiner relied on there being no association between anaplastic mixed glioma and Agent Orange in the medical literature as dispositive evidence that Mr. Bailey's brain cancer was not caused by his in-service exposure to herbicides.

The June 2010 VA examiner's opinion was inadequate as to the issue of direct service connection because the rationale was based solely on general articles and did not discuss any facts pertaining to Mr. Bailey's condition or individual circumstances, including any risk factors that may contribute to that particular type of cancer. *See Stefl*, 21 Vet.App. at 123. The only support for the opinion was the examiner's inability to find medical literature supporting a relationship between Agent Orange exposure and anaplastic mixed glioma.

This is especially troubling for two reasons. First, the Board held that the June 2010 medical opinion "holds significantly greater weight than the treatise articles and lay opinion as it was rendered by a VA medical professional who examined the [v]eteran, reviewed medical records specific to his situation and claim, and provided a thorough and adequate reasoning for the findings specific to the [v]eteran's case." R. at 10. However, contrary to the Board's finding, nothing in the rationale of the examiner's opinion is based on facts or circumstances specific to Mr. Bailey. Second, Mrs. Bailey submitted articles suggesting that exposure to dioxin-like chemicals made tumors more aggressive. The Board acknowledged that these articles "hold some probative value," but discounted

them because they were not specific to Mr. Bailey's case. R. at 9. Although these articles were submitted after the June 2010 opinion, they undermine the conclusion reached by the examiner. The Board failed to discuss these issues.

Because the examiner did not provide any rationale for his opinion that was specific to Mr. Bailey's particular medical condition and circumstances, the Court finds the June 2010 medical opinion inadequate. *See Stefl*, 21 Vet.App. at 124 (noting relevant points that may be discussed in a medical opinion); *see also Claiborne v. Nicholson*, 19 Vet.App. 181, 186 (2005) (rejecting medical opinions that did not indicate whether the physicians actually examined the veteran, did not provide the extent of any examination, and did not provide any supporting clinical data). Without any discussion by an expert of the circumstances specific to Mr. Bailey's medical condition, it is not clear how the Board could have determined that the 2010 report held "significantly greater probative weight" than the medical treatise articles. R. at 10. The Board's reliance on an inadequate medical examination to support its decision was in error, and the Court will vacate and remand the decision. *See Hicks v. Brown*, 8 Vet.App. 417, 422 (1995) (concluding that an inadequate medical evaluation frustrates judicial review). On remand, VA must obtain a medical opinion that addresses Mr. Bailey's particularized circumstances and the relevant medical literature submitted by Mrs. Bailey supporting the claim. On remand, the appellant may submit additional evidence and argument, *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order), and the Board must consider any such additional evidence or argument. *Kay v. Principi*, 16 Vet.App. 529, 534 (2002). The Board must also proceed expeditiously. 38 U.S.C. §§ 5109B, 7112.

III. CONCLUSION

Upon consideration of the foregoing analysis, the record of proceedings before the Court, and the parties' pleadings, the Court will VACATE that part of the July 8, 2016, Board decision that denied entitlement to VA benefits for a brain tumor and REMAND that matter for readjudication consistent with this decision.