

NOTE: This disposition is nonprecedential.

**United States Court of Appeals
for the Federal Circuit**

FRANCES W. LAKE,
Claimant-Appellant

v.

**ROBERT WILKIE, SECRETARY OF VETERANS
AFFAIRS,**
Respondent-Appellee

2018-2421

Appeal from the United States Court of Appeals for
Veterans Claims in No. 17-2625, Judge Joseph L. Toth.

Decided: February 13, 2019

FRANCES W. LAKE, Vestavia, AL, pro se.

ERIN MURDOCK-PARK, Commercial Litigation Branch,
Civil Division, United States Department of Justice, Wash-
ington, DC, for respondent-appellee. Also represented by
JOSEPH H. HUNT, MARTIN F. HOCKEY, JR., ROBERT EDWARD
KIRSCHMAN, JR.; CHRISTINA LYNN GREGG, BRIAN D.
GRIFFIN, Office of General Counsel, United States Depart-
ment of Veterans Affairs, Washington, DC.

Before NEWMAN, MAYER, and DYK, *Circuit Judges*.

PER CURIAM.

Frances W. Lake appeals the judgment of the United States Court of Appeals for Veterans Claims (“Veterans Court”) denying her claim for survivor pension benefits. *See Lake v. O’Rourke*, No. 17-2625, 2018 U.S. App. Vet. Claims LEXIS 861 (June 29, 2018) (“*Veterans Court Decision*”). We dismiss for lack of jurisdiction.

BACKGROUND

Mrs. Lake is the surviving spouse of Melvin E. Lake, a veteran who had active duty service from June 1948 to July 1953. The Department of Veterans Affairs (“VA”) determined that Mrs. Lake met preliminary eligibility requirements for survivor pension benefits. *See* Supplemental Appendix (“S.A.”) 9–10. It further concluded that she was in need of regular “aid and attendance,” *see* 38 C.F.R. § 3.352, because the “[m]edical evidence show[ed]” that she was “unable to bathe, eat, [or] walk in and out of [her] home without assistance.” S.A. 10.

On November 12, 2010, however, the Montgomery, Alabama VA Regional Office (“Regional Office”) denied Mrs. Lake’s claim for survivor pension benefits, including aid and attendance. S.A. 11–14. It determined that Mrs. Lake was not entitled to receive these benefits because her income exceeded the Maximum Annual Pension Rate (“MAPR”), *see* 38 U.S.C. § 1541(d), for surviving spouses in need of regular aid and attendance. Mrs. Lake then appealed to the Board of Veterans’ Appeals (“board”), which remanded her case to the Regional Office for further development. S.A. 15–20. According to the board, “additional development [was] necessary to provide notice to [Mrs. Lake] of the evidence necessary to substantiate her assertions as to the incurrence of unreimbursed medical expenses, and to assist her in obtaining such evidence.” S.A. 16.

LAKE v. WILKIE

3

On remand, the Regional Office sent Mrs. Lake an expense form, explaining that she needed to provide additional information regarding her claimed unreimbursed medical expenses. S.A. 26. After receiving some additional documentation from Mrs. Lake regarding her expenses, however, the Regional Office again denied her claim for survivor pension benefit payments. S.A. 26–27. On appeal, the board affirmed, stating that Mrs. Lake had failed to provide sufficient documentation of her claimed unreimbursed medical expenses. S.A. 26. It further stated that even if Mrs. Lake’s claimed medical expenses had been properly documented, her “countable” income would still be in excess of the MAPR threshold “by substantial amounts.” S.A. 28. The board noted that the Regional Office had determined that even if Mrs. Lake’s claimed payments to an in-home assistant were deducted from her annual income, her income would still exceed the MAPR limit by a significant margin. S.A. 27.

Mrs. Lake then appealed to the Veterans Court, arguing that the board “did not have a complete picture of her expenses.” *Veterans Court Decision*, 2018 U.S. App. Vet. Claims LEXIS 861, at *5. In support, she attached documentation related to the expenses she had incurred at Town Village, an assisted living facility, where she has resided since September 2017. *Id.*

In June 2018, the Veterans Court affirmed the board’s determination that Mrs. Lake’s income level barred the payment of survivor pension benefits. Although the court acknowledged that Mrs. Lake had submitted documentation with her appeal related to her expenses at Town Village, it stated that it could not review evidence that had not been presented to the board. *Id.* at *17–18. After Mrs. Lake’s motion for reconsideration was denied, she filed a timely appeal with this court.

DISCUSSION

This court's authority to review decisions of the Veterans Court is limited by statute. *See* 38 U.S.C. § 7292; *Burris v. Wilkie*, 888 F.3d 1352, 1356 (Fed. Cir. 2018). We have jurisdiction to "decide all relevant questions of law, including interpreting constitutional and statutory provisions." 38 U.S.C. § 7292(d)(1); *see also Halpern v. Principi*, 384 F.3d 1297, 1300 (Fed. Cir. 2004). Absent a constitutional issue, however, we "may not review (A) a challenge to a factual determination, or (B) a challenge to a law or regulation as applied to the facts of a particular case." 38 U.S.C. § 7292(d)(2).

The surviving spouse of a veteran who had at least ninety days of service during a period of war is, under certain circumstances, entitled to survivor pension benefits. *See id.* §§ 1521(j), 1541. To receive such benefits, however, the surviving spouse cannot have an annual income in excess of the MAPR specified in 38 U.S.C. § 1541(d). *See* 38 C.F.R. § 3.23. A higher MAPR applies when, like Mrs. Lake, a surviving spouse is in need of regular "aid and attendance." 38 U.S.C. § 1541(d). Unreimbursed medical expenses, including, in some situations, amounts paid to a nursing home or extended care facility, may be deducted from countable annual income when determining eligibility for survivor pension benefits. *See* 38 C.F.R. §§ 3.272, 3.278.

On appeal, Mrs. Lake argues that her annual income, after deducting eligible expenses, is below the applicable MAPR threshold and that she is therefore entitled to survivor pension benefit payments. Specifically, she asserts that if the \$28,740 in payments she makes each year to Town Village are deducted from her annual gross income of approximately \$43,000, her countable annual income will be below the applicable MAPR limit. In support, Mrs. Lake has submitted documentation indicating that her monthly rent at Town Village is \$2395.

LAKE v. WILKIE

5

We are not unsympathetic to Mrs. Lake's claim that she has incurred deductible expenses that are sufficient to bring her annual income below the applicable MAPR limit. This court, however, has no jurisdiction to make factual determinations regarding eligibility for veterans' benefits. *See Bastien v. Shinseki*, 599 F.3d 1301, 1306 (Fed. Cir. 2010) ("The evaluation and weighing of evidence [related to entitlement to veterans' benefits] and the drawing of appropriate inferences from it are factual determinations committed to the discretion of the fact-finder. We lack jurisdiction to review these determinations."). We therefore cannot conduct the initial evaluation of the documentation submitted by Mrs. Lake to determine whether her expenses at Town Village can be deducted from her annual income for purposes of determining her eligibility for survivor pension benefits.

Instead, Mrs. Lake should provide the Regional Office with documentation substantiating the expenses she has incurred at Town Village. She should also provide the Regional Office with documentation showing the Medicare premiums she has paid, as well as receipts for any medical expenses that have not been reimbursed by insurance. *See* 38 C.F.R. § 3.278.

In this regard, when the Regional Office initially denied Mrs. Lake's claim in 2010, it informed her that she had the right to reapply for survivor pension benefits if her income decreased or her eligible deductible expenses increased. S.A. 12. Once Mrs. Lake supplies the Regional Office with the necessary documentation, it should expeditiously determine whether her countable annual income is below the maximum annual limit, *see* 38 U.S.C. § 1541(d), for receipt of survivor pension benefits.

CONCLUSION

Accordingly, Mrs. Lake's appeal of the judgment of the United States Court of Appeals for Veterans Claims is dismissed for lack of jurisdiction.

DISMISSED

Designated for electronic publication only

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 17-2625

FRANCES W. LAKE, APPELLANT,

v.

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

Before TOTH, *Judge*.

MEMORANDUM DECISION

*Note: Pursuant to U.S. Vet. App. R. 30(a),
this action may not be cited as precedent.*

TOTH, *Judge*: Frances W. Lake, surviving spouse of veteran Melvin E. Lake, challenges a December 5, 2016, decision in which the Board determined that her income level barred payment of survivor pension benefits. She generally argues that the Board did not accurately assess her income and so erroneously concluded that it exceeded the limits to receive pension benefits. For the following reasons, the Court affirms the Board decision.

Surviving spouses of veterans who met certain service requirements may be entitled to improved death pension benefits if the veteran's death was non-service-connected.¹ Entitlement to this pension is determined based on the surviving spouse's annual income.² If her annual income exceeds the annual rate set by law, no pension is payable for that period.³ A higher annual rate is available to a surviving spouse if she needs "aid and attendance" or is "housebound."⁴ In calculating income, payments from any source are counted unless specifically excluded.⁵ The

¹ 38 U.S.C. § 1541(a).

² See 38 C.F.R. §§ 3.271, 3.272 (2017).

³ 38 U.S.C. §§ 1541(b), 5312; 38 C.F.R. § 3.23(b) (2017).

⁴ 38 U.S.C. § 1541(d)(1); 38 C.F.R. § 3.351(a)(5), (b), (c) (2017).

⁵ 38 U.S.C. § 1503; 38 C.F.R. § 3.272.

amount equal to unreimbursed medical expenses, may be deducted from income if such expenses exceed 5% of the annual rate of pension and meet other requirements.⁶

In September 2010, Mrs. Lake sought entitlement to non-service-connected death pension and special monthly pension benefits.⁷ The regional office (RO) issued a November 2010 rating decision that determined that Mrs. Lake was a surviving spouse who required aid and attendance. It calculated her income to be \$27,097 (\$39,896, consisting of Social Security benefits, individual retirement account funds (IRA), and non-VA pension benefits, minus \$12,037 excluded as final burial expenses and \$762 excluded for medical expenses), and concluded that it exceeded the limit for 2010, which was \$12,681 for a surviving spouse in need of aid and attendance without dependents. So, it did not award pension benefits.⁸ She appealed, asserting that she paid roughly \$70 a week for in-home attendance and that these expenses were excludable as unreimbursed medical costs, but she failed to provide the information that would have allowed VA to verify that these costs were excludable. In July 2015, the Board remanded her claim for additional development.

On remand, the RO sent Mrs. Lake an expense form, explaining that she needed to provide specific information for each claimed expense for the RO to determine whether they were excludable. Mrs. Lake responded, but provided incomplete and anecdotal information. In March 2016, the RO issued a Supplemental Statement of the Case (SSOC), restating its November 2010 findings. It also explained that Mrs. Lake did not provide the information needed for it to determine whether her claimed expenses were excludable and that rent and non-medical living expenses were not excludable. And the RO further explained that, assuming for the sake of argument that Mrs.

⁶ Section 3.272(g)(2):

(2) Surviving spouse's income. Unreimbursed medical expenses will be excluded when all of the following requirements are met:

- (i) They were or will be paid by a surviving spouse for medical expenses of the spouse, veteran's children, parents and other relatives for whom there is a moral or legal obligation of support;
- (ii) They were or will be incurred on behalf of a person who is a member or a constructive member of the spouse's household; and
- (iii) They were or will be in excess of 5 percent of the applicable maximum annual pension rate or rates for the spouse (including increased pension for family members but excluding increased pension because of need for aid and attendance or being housebound) as in effect during the 12-month annualization period in which the medical expenses were paid.

⁷ R. at 407-15.

⁸ R. at 373-78.

Lake had adequately supported her assertion that she paid roughly \$70 a week in excludable in-home attendance costs, excluding \$3,640 (\$70 times 52 weeks, so the annual amount) would still not place her income below the \$12,681 limit to receive pension benefits.⁹

While the claim was pending, Mrs. Lake sent receipts and written accounts of expenses, totaling \$202.85, in an attempt to lower her calculated income. In another SSOC, the RO determined that her income still exceeded the pension limit. Afterward, she submitted more miscellaneous records documenting expenses, but did not provide the information necessary for the RO to determine whether the expenses were excludable. The RO issued a final SSOC, again concluding that her income still exceeded the pension income limit.

In the decision on appeal, the Board determined that Mrs. Lake's income exceeded the pension income limit for 2010 and each following year. It pointed out that she did not "provide the detailed accounting . . . which is required" to determine whether many of her claimed expenses were excludable.¹⁰ The Board explained that VA requires a surviving spouse to support a request to exclude unreimbursed medical expenses with five details: (1) the purpose of the claimed medical expense, (2) the out-of-pocket amount that the claimant paid for which no reimbursement is expected, (3) the date the expense was paid, (4) the name of the medical service provider or payee, and (5) for whom the expense was paid.¹¹ It noted that Mrs. Lake did not provide this information for many of her claimed medical expenses despite VA making specific requests for it. She appealed.

In her informal brief, she argues that the Board did not have a complete picture of her expenses. She also asserts that VA did not provide her a paper copy of the record before the agency (RBA) so that she had to pay a copy center \$63.71 to print it out. She attached to her brief a letter from the assisted living facility where she's resided since September 2017, a receipt from the copy center where she printed the RBA, and a voided check. Finally, she appears to take issue with the fact that the Board calculated IRA withdrawals as income. But she does not allege, and the record does not show, that VA failed to notify her of the evidence necessary to substantiate her claim or failed to adequately explain why it was denying her the full relief she sought.

⁹ R. at 147-66.

¹⁰ R. at 9.

¹¹ VA ADJUDICATION PROCEDURES MANUAL, M21-1 MV.iii.1.G.5.b.

The Court reviews the Board's factual determination that a claimant's income exceeded the pension income limit for clear error.¹² A factual finding, although supported by some evidence, is clearly erroneous when, upon full review of the record, the Court has a firm and definite conviction that a mistake has been committed.¹³ Finally, the Court's practice is to sympathetically construe a self-represented claimant's filings.¹⁴

In response to Mrs. Lake's complaint about the RBA, the Secretary asserts that he sent Mrs. Lake an electronic copy of the RBA and, after she filed her brief, a paper copy.¹⁵ Since Mrs. Lake did not have the preferred paper copy when she submitted her brief, the Secretary indicated in an earlier filing that he would not oppose a motion by Mrs. Lake to submit a substituted brief after she had a chance to review the paper RBA. She did not do so. Although the Court recognizes the inconvenience that Mrs. Lake had to go through to get a paper copy of the record, she did have an electronic copy of the record, the Secretary remedied the issue by providing a paper copy, and she didn't seek the opportunity to file another brief after she received the paper copy. Moreover, the alleged error in no way impacts the sufficiency of the Board decision. The Court discerns no prejudice to her in this matter.¹⁶

Next, the Secretary notes that the documents Mrs. Lake attached to her brief were not before the Board when it issued the decision on appeal. This is true. The Court is not permitted to review evidence that was not before the Board.¹⁷ Consequently, the Court cannot consider the items attached to her brief.

Lastly, it was not erroneous for the Board to include the withdrawn IRA funds as part of Mrs. Lake's income for pension purposes. When calculating income, payments from any source, including retirement funds, are counted unless specifically excluded.¹⁸ There is no exclusion for IRA funds.¹⁹ Thus, the Court discerns no error in the Board decision regarding this matter.

¹² See *Sharp v. Shulkin*, 29 Vet.App. 26, 31 (2017).

¹³ *Id.*

¹⁴ See *Gomez v. McDonald*, 28 Vet.App. 39, 43 n.1 (2015).

¹⁵ See 38 C.F.R. § 1.577(a) (2017).

¹⁶ See *Beverly v. Nicholson*, 19 Vet.App. 394, 403 (2005) (describing the nonprejudicial error rule).

¹⁷ See 38 U.S.C. § 7252(b); see also *Robinson v. McDonald*, 28 Vet.App. 178, 184 (2016).

¹⁸ 38 U.S.C. § 1503; 38 C.F.R. § 3.272.

¹⁹ *Id.*; cf. *Johnson v. Brown*, 9 Vet.App. 369, 372 (1996).

Although the Court sympathizes with Mrs. Lake's frustration, it can find no legal or factual error in her case. If she believes that VA overlooked additional exclusions that would sufficiently reduce her income to a degree that would allow her to receive survivor pension benefits, she must provide the information VA requires to verify and allow such exclusions.

Having fully considered all the appellant's arguments, the Court AFFIRMS the December 5, 2016, Board decision.

DATED: June 29, 2018

Copies to:

Frances W. Lake

VA General Counsel (027)

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from this filing is
available in the
Clerk's Office.**