

NOTE: This disposition is nonprecedential.

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

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**CHERRIE A. HOLLIE,**  
*Claimant-Appellant*

v.

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

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2020-1486

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Appeal from the United States Court of Appeals for  
Veterans Claims in No. 19-1265, Chief Judge Margaret C.  
Bartley.

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Decided: June 3, 2020

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CHERRIE A. HOLLIE, Oakland, CA, pro se.

DAVID PEHLKE, Commercial Litigation Branch, Civil  
Division, United States Department of Justice, Washing-  
ton, DC, for respondent-appellee. Also represented by  
JOSEPH H. HUNT, CLAUDIA BURKE, ROBERT EDWARD  
KIRSCHMAN, JR.

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*Designated for electronic publication only*

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

No. 19-1265

CHERRIE A. HOLLIE, APPELLANT,

v.

ROBERT L. WILKIE,  
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before BARTLEY, *Judge*.

**MEMORANDUM DECISION**

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

BARTLEY, *Judge*: Cherrie A. Hollie appeals a December 27, 2018, Board of Veterans' Appeals (Board) decision that denied her recognition as the surviving spouse of veteran Charlie F. Hollie for the purpose of entitlement to survivor benefits. Record (R.) at 3-6. For the reasons that follow, the Court will affirm the December 2018 decision.

**I. FACTS**

Mr. Hollie served on active duty in the U.S. Marine Corps from June 1960 to June 1964 and in the U.S. Navy from August 1964 to August 1968.<sup>1</sup> R. at 349; *see* R. at 209-212, 389. In July 1970, he married Ms. Hollie, R. at 960, and they divorced in April 1976, R. at 343-45. Mr. Hollie died in March 2009, and the death certificate listed his marital status as divorced. R. at 374.

In February 2015, Ms. Hollie filed a claim for survivor benefits, reporting that she was forced to divorce Mr. Hollie because of his domestic violence. R. at 331-36. A VA regional office (RO) denied, *inter alia*, dependency and indemnity compensation (DIC) and death pension in an

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<sup>1</sup> The Board decision on appeal did not acknowledge Mr. Hollie's first period of service. *See* R. at 3.

October 2015 decision, citing her divorce from Mr. Hollie as the reason she could not be recognized as his surviving spouse. R. at 316-17.<sup>2</sup>

In June 2016 correspondence, Ms. Hollie asserted her belief that she qualifies as Mr. Hollie's surviving spouse because neither of them remarried and they had a son. R. at 306. She also described episodes of violence and misconduct from Mr. Hollie during and after their marriage. R. at 306-08. In September 2016, she testified before a decision review officer at the RO, further describing Mr. Hollie's actions, as well as her disabilities that developed as a result. R. at 272-85. In December 2016, the RO issued a Statement of the Case, R. at 138-74, and Ms. Hollie perfected her appeal, R. at 73-75.<sup>3</sup> With her Substantive Appeal, Ms. Hollie reiterated her contention that she qualified as Mr. Hollie's surviving spouse because they had a son, she did not remarry, and the divorce was caused by Mr. Hollie's abusive behavior. *Id.*

At a September 2018 Board hearing, Ms. Hollie testified further as to Mr. Hollie's actions that led to their divorce. R. at 19-35. In conjunction with her testimony, she submitted photos taken before her marriage, R. at 9, 11; wedding photos, R. at 10; a November 2017 Social Security Administration (SSA) letter documenting her assertion that her marriage to Mr. Hollie "ended in death," R. at 14; and a statement that she had submitted to VA her 1968 college entry transcript, R. at 16.

In December 2018, the Board issued the decision on appeal. R. at 3-6. The Board noted Ms. Hollie's argument that she met the survivor pension benefits requirements outlined in 38 C.F.R. § 3.54 but explained that she had not met the threshold 38 C.F.R. § 3.50(b) requirement that a veteran and the surviving spouse be married at the time of the veteran's death. R. at 5. The Board found that Ms. and Mr. Hollie were not married at the time of his death based on their divorce in April 1976 and, therefore, that Ms. Hollie "cannot be recognized as [Mr. Hollie's] surviving spouse for survivor benefits purposes." *Id.* The Board further explained that it was not

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<sup>2</sup> The RO also denied accrued benefits because Mr. Hollie was not service connected for any disabilities at the time of his death and there were no claims pending at the time of his death for which benefits were owed. *Id.* It does not appear that Ms. Hollie appealed the denial of accrued benefits and she does not assert otherwise on appeal.

<sup>3</sup> It appears that Ms. Hollie's Substantive Appeal was filed in July 2017 and was untimely under the governing regulation then in effect. See 38 C.F.R. § 20.302(b)(1) (2017). However, because the 60-day period is not jurisdictional, VA may "explicitly or implicitly" waive any issue as to timeliness. *Percy v. Shinseki*, 23 Vet.App. 37, 45 (2009). By adjudicating the matter on appeal, the Board implicitly waived the timeliness issue, a favorable finding the Court will not disturb. See *Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007).

authorized by statute to render a decision based in equity. R. at 6. This appeal followed. While this appeal was pending, Ms. Hollie filed a motion for oral argument.

## II. JURISDICTION AND STANDARD OF REVIEW

Ms. Hollie's appeal is timely and the Court has jurisdiction to review the December 2018 Board decision pursuant to 38 U.S.C. §§ 7252(a) and 7266(a). Single-judge disposition is appropriate in this case. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990).

The Board's determination of whether a claimant qualifies as a surviving spouse is a factual question the Court reviews under the "clearly erroneous" standard of review set forth in 38 U.S.C. § 7261(a)(4); *see Dedicatoria v. Brown*, 8 Vet.App. 441, 443 (1995). "A factual finding 'is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" *Hersey v. Derwinski*, 2 Vet.App. 91, 94 (1992) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)).

With any finding on a material issue of fact and law presented on the record, the Board must support its factual determinations with an adequate statement of reasons or bases that enables the claimant to understand the precise basis for that determination and facilitates review in this Court. 38 U.S.C. § 7104(d)(1); *Gilbert v. Derwinski*, 1 Vet.App. 49, 57 (1990). To comply with this requirement, the Board must analyze the credibility and probative value of evidence, account for evidence that it finds persuasive or unpersuasive, and provide reasons for its rejection of material evidence favorable to the claimant. *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table).

## III. ANALYSIS

### A. Recognition as Surviving Spouse

Ms. Hollie argues in her informal brief that, under 38 C.F.R. § 3.54, she is entitled to recognition as Mr. Hollie's surviving spouse because they were married for over a year and their child was born during their marriage. Appellant's Informal Brief (Br.) at 4-6. She asserts that, despite the divorce, she still considered herself married to Mr. Hollie, citing as support the November 2017 SSA letter confirming her description of the marriage as ending with his death. *Id.* at 5. She further contends that the Board failed to consider her photographs, which she

acknowledges are part of the record, and her 1968 college entry transcript, which she asserts is missing. *Id.* at 3. Finally, she asserts that she is "entitled to be awarded a survivor's pension as a matter of equity," *id.* at 6, and in accordance with the benefit of the doubt doctrine, R. at 8.

The Secretary responds that Ms. Hollie does not dispute that she and the veteran were divorced at the time of his death, and he contends that the divorce prevents VA from recognizing her as a surviving spouse for survivor benefits purposes. Secretary's Br. at 3-5. The Secretary further notes that neither the Board nor the Court is empowered to act in equity, *id.* at 5-6, and that, even assuming that the record is incomplete because of VA error, Ms. Hollie has not demonstrated that the error prejudiced the Board's surviving spouse determination given the record evidence of the Hollie's divorce, *id.* at 6-7.

DIC benefits may be awarded to a veteran's "surviving spouse" if the veteran died from a service-connected or compensable disability. 38 U.S.C. § 1310. Additionally, VA may award death pension to surviving spouses for non-service-connected deaths of veterans receiving disability compensation. 38 U.S.C. § 1541(a).

A surviving spouse is a person (1) validly married to the veteran at the time of 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 a 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." 38 U.S.C. § 101(3); *see* 38 C.F.R. § 3.50(b) (2019); *see also* 38 C.F.R. § 3.54(c) (2019) (imposing additional limitations not implicated here).

In the December 2018 decision on appeal, the Board explained that the law requires that a person be married to a veteran at the time of the veteran's death to qualify as a surviving spouse. R. at 5. The Board addressed Ms. Hollie's assertion that the divorce resulted from Mr. Hollie's abusive behavior but found that she does not dispute the validity of the divorce and so cannot qualify as a surviving spouse. R. at 5; *see Haynes v. McDonald*, 785 F.3d 614, 616 (Fed. Cir. 2015) (rejecting the argument that the married-at-the-time-of-death requirement should be excused because divorce was precipitated by the veteran's abusiveness); *cf.* 38 U.S.C. § 101(3) (noting an exception to the continuous cohabitation requirement when a separation (not divorce) was due to the misconduct of, or procured by, the veteran without fault of the spouse). The Board also addressed Ms. Hollie's contention that she meets the requirements for benefits under § 3.54 but

explained that the "status of surviving spouse is a preliminary question" to be resolved before applying § 3.54 requirements, which apply only to those who have already been recognized as a surviving spouse. R. at 5. In other words, § 3.54 does not provide an alternate mechanism for recognition as a surviving spouse and, therefore, is inapplicable here.

Ultimately, the Board found that Ms. and Mr. Hollie were not married at the time of his death. R. at 5. Ms. Hollie does not dispute this finding. A review of the record confirms the Board's characterization. See R. at 343-45 (April 1976 divorce decree), 374 (March 2009 death certificate listing Mr. Hollie as divorced at the time of his death). In this case, the law is dispositive and requires that a person be married to a veteran at the time of the veteran's death to qualify as a surviving spouse for the purposes of DIC and survivor death pension. This Court cannot contradict or ignore requirements for entitlement to benefits set forth by Congress. See *Moffitt v. Brown*, 10 Vet.App. 214, 225 (1997); see also *Boyer v. West*, 210 F.3d 1351, 1356 (Fed. Cir. 2000) (Courts "can only interpret the statutes that are enacted by the Congress . . . [and] are simply powerless to amend any statutory provision sua sponte."); *Fritz v. Nicholson*, 20 Vet.App. 507, 511 (2006) (holding that this Court cannot mandate an award of benefits contrary to rules provided by Federal law).

The Court sympathizes with Ms. Hollie; however, the Board properly found that the evidence of record reflects, and she does not dispute, that she and Mr. Hollie obtained a valid divorce and did not thereafter remarry. Her own perception that she remained Mr. Hollie's wife, including her representation to SSA that their marriage ended in his death, does not change the requirement for marriage at the time of the veteran's death under 38 U.S.C. § 101(3). See 38 C.F.R. § 3.50(b). Furthermore, to the extent that she asserts that the Board failed to discuss her photographs or acquire her college entry transcript, she has not explained how those items, which document her life through the date of her marriage to Mr. Hollie, are evidence that she qualifies as his surviving spouse for the purpose of VA benefits.<sup>4</sup> See 38 U.S.C. § 7261(b)(2) (requiring the Court to "take due account of the rule of prejudicial error"); *Shinseki v. Sanders*, 556 U.S. 396, 409 (2009) (explaining that "the burden of showing that an error is harmful normally falls upon the party attacking the agency's determination"); *Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en

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<sup>4</sup> To the extent that her argument could be construed as raising a dispute with the content of the record before the agency, the time to raise such a dispute has passed. See U.S. VET. APP. R. 10(b).