NOTE: This disposition is nonprecedential.

United States Court of Appeals for the Federal Circuit

MARK H. BONNER,
Claimant-Appellant

v.

DENIS MCDONOUGH, SECRETARY OF VETERANS AFFAIRS,
Respondent-Appellee

2021-1817

Appeal from the United States Court of Appeals for Veterans Claims in No. 18-6927, Chief Judge Margaret C. Bartley, Judge Michael P. Allen, Judge William S. Greenberg.

JUDGMENT

(Filed Dec. 4, 2021)

MARK H. BONNER, Ave Maria School of Law, Naples, FL, argued for claimant-appellant.

BORISLAV KUSHNIR, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for respondent-appellee. Also

represented by RETA EMMA BEZAK, BRIAN M. BOYNTON, CLAUDIA BURKE, MARTIN F. HOCKEY, JR.; BRIAN D. GRIFFIN, ANDREW J. STEINBERG, Office of General Counsel, United States Department of Veterans Affairs, Washington, DC.

THIS CAUSE having been heard and considered, it is

ORDERED and ADJUDGED:

PER CURIAM (PROST, TARANTO, and CHEN, *Circuit Judges*).

AFFIRMED. See Fed. Cir. R. 36.

ENTERED BY ORDER OF THE COURT

December 14, 2021	/s/ Peter R. Marksteiner
Date	Peter R. Marksteiner Clerk of Court

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 18-6927

MARK H. BONNER, APPELLANT,

v.

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

On Appeal from the Board of Veterans' Appeals

(Argued October 23, 2020 Decided January 13, 2021)

Mark H. Bonner, of Naples, Florida, for the appellant.

Jonathan Z. Morris, with whom *William A. Hudson, Jr.*, Principal Deputy General Counsel; *Mary Ann Flynn*, Chief Counsel; *Sarah W. Fusina*, Deputy Chief Counsel; and *Margaret E. Sorrenti*, Appellate Attorney, all of Washington, D.C., were on the brief for the appellee.

Before BARTLEY, *Chief Judge*, and GREENBERG and ALLEN, *Judges*.

ALLEN, *Judge*, filed the opinion of the Court. GREENBERG, *Judge*, filed a dissenting opinion.

ALLEN, *Judge*: Emmett Bonner had an extraordinary career in the United States Navy. After graduating from the United States Naval Academy, he served the Nation honorably in World War II and the conflicts in Korea and Vietnam. He rose to the rank of rear admiral. As we will discuss, he passed away far too young; he was only 57.

The appellant, Mark E. Bonner,[1] is Admiral Bonner's surviving son. He appeals a November 2, 2018, Board of Veterans' Appeals decision that found no clear and unmistakable error (CUE) in a February 9, 1976, VA regional office (RO) decision that denied service connection for the veteran's cause of death.[2] This appeal, which is timely and over which the Court has jurisdiction,[3] was referred to a panel of the Court, with oral argument, to address whether the Board's decision finding no CUE in the February 1976 RO decision was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. For the reasons discussed below, we are left with no option other than to affirm the November 2018 Board decision.

I. FACTS AND PROCEDURAL HISTORY

Admiral Bonner served on active duty in the U.S. Navy from June 1939 to April 1972, including, as we noted, service in World War II, Korea, and Vietnam. Sadly, in August 1975, the veteran died. An August 1975 autopsy report listed the veteran's cause of death as Hodgkin's disease, a malignant lymphoma (a form of cancer).[4] As we will discuss below, Admiral Bonner may have actually died from non-Hodgkin's lymphoma (NHL), after a year of being diagnosed with and

---

[1] Mr. Bonner was substituted as the appellant in this matter in September 2018.

[2] Record (R.) at 3-12.

[3] *See* 38 U.S.C. §§ 7252(a), 7266(a).

[4] R. at 157.

treated for Hodgkin's disease. In September 1975, Elizabeth H. Bonner, the veteran's surviving spouse, sought dependency and indemnity compensation (DIC) for the cause of her husband's death due to "cancer."[5]

In February 1976, the RO denied Mrs. Bonner's DIC claim, explaining that Admiral Bonner's Hodgkin's disease (cancer) was not related to service because the service treatment records were silent for that condition and he was not diagnosed with it until after he was discharged from service.[6] The following month, VA notified Mrs. Bonner that although she was not entitled to DIC for the cause of her husband's death, it would consider entitlement to non-service-connected death pension.[7] Mrs. Bonner did not appeal the February 1976 RO decision and, as we will explain, it became final.

In early 1995, Mrs. Bonner filed a claim with the Department of Justice (DOJ) under the Radiation Exposure Compensation Act[8] seeking benefits based on Admiral Bonner's participation in atomic weapons testing. In developing this claim, DOJ sought a medical opinion from the National Institutes of Health (NIH). In June 1995, NIH reviewed medical evidence related to Admiral Bonner's death, including the August 1975

---

[5] R. at 20.

[6] R. at 1680.

[7] R. at 1644.

[8] 42 U.S.C. § 2210 note, Pub. L. No. 106-426, 104 Stat. 920 (Oct. 15, 1990). The Radiation Exposure Compensation Act, also known as RECA, provides one-time payments to certain people who participated in atomic weapons testing.

autopsy report, and explained that while his cancer simulated Hodgkin's disease, it "favored" an NHL diagnosis.[9]

In October 1995, after receiving this evidence of Admiral Bonner's apparent misdiagnosis, Mrs. Bonner filed another DIC claim and applied for retroactive VA benefits. By that time, VA had issued a regulation, 38 C.F.R. § 3.313, that authorized presumptive service connection for NHL. VA made that regulation retroactively effective to August 5, 1964,[10] and the VA Office of General Counsel explained that benefits could be awarded under that regulation even if a claim had previously been denied.[11]

In November 1995, the RO reopened Mrs. Bonner's DIC claim based on the submission of the June 1995 NIH report as new evidence. The RO acknowledged that the August 1975 autopsy report reflected that Admiral Bonner died from Hodgkin's disease and the June 1995 NIH report reflected that his death was caused by NHL. The RO then granted Mrs. Bonner's claim, explaining that "[b]oth Ho[d]gkin's disease and [NHL] may be caused by exposure to an herbicide containing dioxin. Therefore, service connection for cause of death is established."[12] The RO further explained that VA considers the cause of death of a veteran to be service connected when one or more service-connected

---

[9] R. at 155.

[10] 55 Fed. Reg. 43, 123 (Oct. 20, 1990).

[11] *Id.*

[12] R. at 1524.

disabilities was either the primary cause of death or a contributory cause of death. The RO concluded that "[s]ervice connection for the cause of the veteran's death is granted as the evidence shows Hodgkin's disease as a contributory cause of death."[13] The RO also assigned an effective date of December 1, 1995, 1 month after VA received Mrs. Bonner's claim to reopen. Mrs. Bonner timely disagreed with that decision, specifically contesting the assigned effective date and asserting that the effective date should go back to August 1975, "the first day of the month in which [the veteran] died."[14]

In July 1996, the RO issued a Statement of the Case granting Mrs. Bonner an effective date of November 1, 1994, for DIC benefits, 1 year before the date VA received her claim to reopen. Mrs. Bonner continued to contest the assigned effective date and ultimately appealed her decision not only to the Board, but also to this Court and then the U.S. Court of Appeals for the Federal Circuit.[15] All affirmed the November 1, 1994, effective date. We will return to the judicial decisions in a moment because, as we explain, they are critical to the resolution of the appeal before us.

In June 2008, Mrs. Bonner sought to revise the February 1976 RO decision based on CUE. She argued

---

[13] *Id.*

[14] R. at 1507.

[15] *See Bonner v. Nicholson* (*Bonner II*), 497 F.3d 1323 (Fed. Cir. 2007); *Bonner v. Nicholson* (*Bonner I*), 19 Vet.App. 188 (2005).

that § 3.313 should have retroactively applied to the February 1976 RO decision and that the evidence clearly showed that Admiral Bonner's cause of death in 1975 was misdiagnosed.[16] In July 2009, the RO found no CUE in its February 1976 decision because that decision was properly based on the evidence of record available and the laws in effect at that time. The current appellant, Mark Bonner, an attorney and the son of Admiral and Mrs. Bonner, subsequently became Mrs. Bonner's representative.[17] In October 2009, Mrs. Bonner submitted a Notice of Disagreement with the July 2009 RO decision.[18]

In September 2010, Mrs. Bonner died and the following month the appellant notified VA of her death.[19] However, and rather inexplicably, VA continued to adjudicate her appeal and in an October 2010 Statement of the Case continued to find no CUE in the February 1976 RO decision. The appellant appealed that decision to the Board.[20]

In August 2012, the Board dismissed the appeal for lack of jurisdiction, explaining that VA had not acted on a December 2010 request for substitution after Mrs. Bonner's death.[21] In September 2018, the appeal was returned to the Board after VA determined

---

[16] R. at 189.

[17] R. at 675.

[18] R. at 671-73.

[19] R. at 657.

[20] R. at 632.

[21] R. at 542-45.

that the appellant could be recognized as a substitute for Mrs. Bonner for the purposes of reimbursement.[22] VA has never provided a satisfactory explanation for why this substitution took nearly 6 years.

In November 2018, the Board issued the decision on appeal. The Board first found that the February 1976 rating decision denying Mrs. Bonner's DIC claim had become final and that she had been properly notified of that denial. Then, the Board found, in the alternative, that even if the February 1976 RO decision had not become final, service connection for the cause of the veteran's death was granted in a November 1995 RO decision and that decision was subsumed by the Board in its 2001 decision. Finally, the Board found no CUE in the February 1976 rating decision, rejecting the appellant's arguments for three reasons. First, the Board explained that at the time of the February 1976 rating decision, § 3.313 had not yet been promulgated and thus could not serve as a basis for finding CUE in that decision. Second, the appellant's argument that the RO misapplied § 3.313 in its November 1995 decision fails because that decision was subsumed by the Board's 2001 decision, and the RO lacked jurisdiction to consider whether CUE exists in that decision. Finally, the Board explained that none of the record evidence available at the time of the veteran's death indicated that he may have had NHL. Not until June 1995 was it discovered that the veteran almost certainly died from NHL, and that conclusion was based on evidence that

[22] R. at 29.

did not exist in February 1976. Therefore, that evidence cannot be the basis for a finding of CUE. This appeal followed.

II. PARTIES' ARGUMENTS

The appellant raises several arguments asserting that the Board erred in the decision on appeal. First, he argues that the Board erred when it determined that the February 1976 decision did not contain CUE because the RO impermissibly narrowed Mrs. Bonner's claim to exclude types of cancer other than Hodgkin's disease. Second, he maintains that the misdiagnosis of the cause of Admiral Bonner's death in 1975 constitutes CUE. Third, he contends that the February 1976 RO decision never became final and it is still pending under the Federal Circuit's decision in *Ruel v. Wilkie*.[23] Specifically, he asserts that Mrs. Bonner did not appeal the March 1976 RO decision because VA provided insufficient notice that it had denied her claim. In its March 1976 decision, the RO simply placed an "X" in the box labeled "disability or death not due to service" and crossed off the words "disability or." Essentially, he emphasizes that without providing any other information, the RO stated only: "death not due to service."

Finally, the appellant argues that Mrs. Bonner's claim asserting that Admiral Bonner's cause of death was "cancer" was incompletely adjudicated, because instead of addressing the claim for cancer broadly, the RO recharacterized her claim as one for only Hodgkin's

[23] 918 F.3d 939, 942 (Fed. Cir. 2019).

disease, without explanation or notice. He explains that the evidence at the time of that decision shows that NHL was also a potential cause of death or at least a contributing factor that the RO should have considered.

The Secretary argues that the Board's finding that there was no CUE in the February 1976 RO decision was not arbitrary or capricious. He asserts that the evidence at the time of the 1976 decision does not support the undebatable conclusion that the decision was fatally flawed. First, he argues that the evidence at the time of the February 1976 decision showed Hodgkin's disease as the cause of death, which he points out is the same cause of death that service connection was based on in 1995.

Second, he argues that the 1995 NIH report did not exist at the time of the February 1976 decision and therefore cannot be used as a basis for CUE. Even if it could be, there was no definitive diagnosis of NHL in the NIH report, a fact that was addressed and affirmed in prior Court and Federal Circuit decisions. In support of this assertion, the Secretary references the 1997 DOJ record that states that the NIH report contained evidence that favored a diagnosis of NHL but also stated that there was evidence simulating Hodgkin's disease.

Third, the Secretary asserts that any argument concerning whether the 1975 autopsy report raised the issue of NHL as the cause of the veteran's death amounts to contesting the weighing of the evidence,

which cannot constitute CUE. Moreover, he asserts that this Court had already concluded at the time of the 1976 RO decision the evidence established that Mrs. Bonner's 1975 DIC claim was one for Hodgkin's disease, because the evidence did not reasonably raise any other causes of the veteran's death, including by other types of cancer.

Regarding finality, the Secretary asserts that the February 1976 rating decision became final and Mrs. Bonner received adequate notice of that decision. He explains that VA provided Mrs. Bonner with notice that went beyond a mere sentence. In fact, she was informed of the type of claim at issue, why the claim was denied, and how to appeal through the provision of a notice of her appellate rights.

III. ANALYSIS

A. Prior Judicial Decisions

As we mentioned above, this is not the first time the Bonner family has been before the Court. Mrs. Bonner directly appealed a September 2001 Board decision that denied an effective date before November 1994 for her award of DIC. We issued a precedential decision in that appeal affirming the Board.[24] And then the Federal Circuit affirmed our decision, also in a precedential decision.[25] We recognize that our jurisdiction in this matter is limited to a review of the

---

[24] *Bonner I*, 19 Vet.App. at 188.

[25] *Bonner II*, 497 F.3d at 1323.

November 2018 Board decision on appeal.[26] But, in Mrs. Bonner's prior appeal both this Court *and* the Federal Circuit made determinations in the precedential decisions that impact the Court's decision here today.[27]

In June 2005, the Court affirmed the Board's 2001 decision denying an effective date before November 1994 for Mrs. Bonner's DIC benefits. The Court concluded that because the final February 1976 rating decision was not reopened until November 1995, the effective-date provisions set out in § 3.114(a) only allowed for retroactive benefits to be awarded for 1 year before Mrs. Bonner filed her claim to reopen. The Court also addressed Mrs. Bonner's argument that her original 1975 claim for "cancer" encompassed a claim for all types of cancer, including NHL. However, the Court rejected that argument because it determined that the evidence of record at the time of the veteran's death did not "reasonably raise[] any claims for the cause of death by types of cancer other than Hodgkin's disease."[28] Thus, the Court's prior decision is significant for establishing at least two important points: (1) Mrs. Bonner's February 1975 claim for "cancer" did not encompass NHL; and (2) the February 1976 rating decision became final.

---

[26] 38 U.S.C. § 7252

[27] *See Bethea v. Derwinski*, 2 Vet.App. 252, 254 (1992) (holding that the Court is bound by its own panel decisions as well as decisions of the Federal Circuit).

[28] *Bonner I*, 19 Vet.App. at 195.

When Mrs. Bonner appealed the Court's June 2005 decision to the Federal Circuit, she argued that we had exceeded our jurisdiction when we determined that the cause of Admiral Bonner's death was Hodgkin's disease.[29] However, in November 2007, the Federal Circuit affirmed the Court's decision. The Federal Circuit rejected Mrs. Bonner's argument and concluded that the Court did not commit prejudicial error. The Federal Circuit explained that the Court's determination that "a claim for NHL was not supported by the evidence before the RO in 1976," was a factual inquiry it lacked jurisdiction to address.[30] As a result, our decision on that point remained. Then, with regard to Admiral Bonner's cause of death, the Federal Circuit stated that the Court did not err when it "relied on the characterization of [Mrs. Bonner's] 1975 claim, evidenced by the supporting documentation, as one for death caused by Hodgkin's disease."[31] The Federal Circuit explained that the Court "merely concluded that this information provided a plausible basis for the RO's determination that Hodgkin's disease was the cause of death."[32] The Federal Circuit essentially acknowledged that what this Court had done was to determine that based on the evidence at the time of the February 1976 rating decision the RO did not clearly err in concluding that Admiral Bonner had died of Hodgkin's disease. Judge Newman dissented because she believed that

---

[29] *Bonner II*, 497 F.3d at 1327.

[30] *Id.* at 1328.

[31] *Id.*

[32] *Id.*

the autopsy report contained a "plainly incorrect" diagnosis and that VA had erred in not correcting the RO's erroneous denial of DIC based on that misdiagnosis.

As we discuss below, the findings in these two decisions guide us today. Quite simply, the conclusions reached in connection with Mrs. Bonner's prior appeals leave us with little room to maneuver. We will address the appellant's finality argument before addressing the remainder of his CUE arguments.

B. Finality of the February 1976 RO Decision

Although the parties do not effectively discuss the preclusive effects of the prior decisions discussed above, it does not go unnoticed that the principles of collateral estoppel, or issue preclusion, apply here.[33] "Once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case."[34] Essentially, the goal underlying collateral estoppel, or issue preclusion, is to prevent litigants from repeatedly litigating,

---

[33] *See Young v. Shinseki*, 25 Vet.App. 201, 204 (en banc) (explaining that issue preclusion requires that "(1) the issue previously adjudicated is identical to the one currently before the Court; (2) the issue was 'actually litigated' in the prior proceeding; (3) the Court's resolution of that issue was necessary to the resulting judgment; and (4) the litigant was fully represented in the prior proceeding").

[34] *San Remo Hotel, L.P. v. City & County of S.F.*, 545 U.S. 323, 336 n.16 (2005).

and tribunals from readjudicating, finally decided issues of fact or law.[35]

As explained above, a panel of this Court has already determined that the February 1976 rating decision became final.[36] *And* the Federal Circuit affirmed that decision.[37] Therefore, applying the principles of collateral estoppel basically ends the matter. However, even if we were at liberty to disregard these prior determinations, the evidence of record supports the Board's finding that the February 1976 rating decision became final. It is undisputed that Mrs. Bonner did not file an NOD within the 1-year period following the 1976 RO decision.[38] Instead, the appellant's argument about finality focuses on whether VA properly notified Mrs. Bonner of the 1976 denial.

In *Ruel v. Wilkie*,[39] the Federal Circuit held that "to meet the notice requirements of § 3.103(e), an explicit denial must state, or clearly identify in some way, the claim(s) being denied . . . including the reason for the decision, the date effectuated, and notice of

---

[35] *See DiCarlo v. Nicholson*, 20 Vet.App. 52, 55-56 (2006) (holding that an issue explicitly addressed and decided in a final Board decision generally may not be readdressed in a subsequent Board decision, with certain exceptions, including where there is CUE in the earlier Board decision); *see also Hazan v. Gober*, 10 Vet.App. 511, 521 (1997) (noting that issue preclusion forbids "relitigating the same issue based upon the same evidence").

[36] *See Bonner I*, 19 Vet.App. at 195.

[37] *See Bonner II*, 497 F.3d at 1324.

[38] 38 C.F.R. § 19.52.

[39] 918 F.3d 939.

appellate rights."[40] In applying that holding to the facts in *Ruel*, the Federal Circuit identified the one sentence purporting to notify the claimant that her DIC benefits had been denied:"The evidence does not show that the veteran's death was due to a service connected condition."[41] The Federal Circuit concluded that this sentence did not identify the claim VA had decided, noting that the sentence was sandwiched between two other sentences dealing with a claim having nothing to do with DIC benefits. The Federal Circuit concluded that such notice did not suffice to deny Mrs. Ruel's DIC claim under § 3.103(e). We can readily distinguish Mrs. Bonner's situation from that in *Ruel*.

A review of the record shows that on VA Form 21-523, dated March 9, 1976, and entitled "Disallowance," VA notified Mrs. Bonner that Admiral Bonner's death was "not due to service" and that there was "disallowance of DIC and Req. For Evidence."[42] That form also referenced the February 1976 RO decision. Reading the VA form and RO decision together reveals that VA notified Mrs. Bonner of the kind of claim the RO denied, the reason for the denial, and the date of the denial. Moreover, of record is a March 8, 1976, (FL 21-144) letter from the RO to Mrs. Bonner that includes notice of her appellate rights. Therefore, the appellant fails to demonstrate that under *Ruel* Mrs. Bonner received insufficient notice of the 1976 RO decision.

---

[40] *Id.* at 942.

[41] *Id.*

[42] R. at 1677.

But there is more. Even if the Court assumes that Mrs. Bonner received insufficient notice, any notice error became moot after the RO reopened and granted the claim in November 1995. And after that, the Board issued a 2001 decision that affirmed the RO's 1995 grant of service connection and assigned the November 1994 effective date. And as we noted above, both this Court and the Federal Circuit affirmed the Board's 2001 decision.[43] Thus, even if there were initial notice errors regarding the 1976 denial, and to be clear, we don't think there were, they are no longer at issue.[44]

C. CUE in the February 1976 RO Decision

The standards governing CUE are well known. CUE is established when (1) either the correct facts as they were known at the time were not before the adjudicator, the adjudicator made an erroneous factual finding, or the statutory or regulatory provisions extant at the time were incorrectly applied; (2) the alleged error is "undebatable," rather than a mere "disagreement as to how the facts were weighed or evaluated;" and (3) the error "manifestly changed the

---

[43] *Bonner II*, 497 F.3d at 1323; *Bonner I*, 19 Vet.App. at 188.

[44] 38 C.F.R. § 20.1104 (2020); *see Brown v. West*, 203 F.3d 1378, 1381 (Fed. Cir. 2000).

outcome" of the decision.[45] The Federal Circuit has recognized this CUE standard as controlling law.[46]

It is not easy to establish CUE in a final decision. This Court has held that an error is "undebatable" when "reasonable minds could only conclude that the original decision was fatally flawed at the time it was made."[47] In sum, "CUE is a very specific and rare kind of 'error' . . . of fact or law, that when called to the attention of later reviewers compels the conclusion, to which reasonable minds could not differ, that the results would have been manifestly different but for the error."[48]

The Court's review of a Board decision finding no CUE in a prior, final RO decision is limited to determining whether the Board's finding was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,"[49] and whether it was supported

---

[45] *Russell v. Principi*, 3 Vet.App. 310, 313-14, 319 (1992); *see George v. Wilkie*, 32 Vet.App. 318, 323-24 (2020); *Simmons v. Wilkie*, 30 Vet.App. 267, 274 (2018); *King v. Shinseki*, 26 Vet.App. 433, 439 (2014); *Bouton v. Peake*, 23 Vet.App. 70, 71-72 (2008); *Damrel v. Brown*, 6 Vet.App. 242, 245 (1994); *see also Bustos v. West*, 179 F.3d 1378, 1380-81 (Fed. Cir. 1999).

[46] *See Cook v. Principi*, 318 F.3d 1334, 1345 (Fed. Cir. 2002); *see also Blanton v. Wilkie*, 823 F. App'x 958 (Fed. Cir. 2020).

[47] *Andrews v. Principi*, 18 Vet.App. 177, 181 (2004), *aff'd sub nom. Andrews v. Nicholson*, 421 F.3d 1278 (Fed. Cir. 2005) (quoting *Russell*, 3 Vet.App. at 313-14).

[48] *Fugo v. Brown*, 6 Vet.App. 40, 43 (1993).

[49] 38 U.S.C. § 7261(a)(3)(A).

by an adequate statement of reasons or bases.[50] To comply with this requirement, the Board's reasons or bases must enable a claimant to understand the precise basis for the Board's decision and facilitate review in this Court.[51] The Board must also analyze the credibility and probative value of the evidence, account for the evidence that it finds persuasive or unpersuasive, and provide the reasons for its rejection of any material evidence favorable to the claimant.[52]

As summarized above, the Board found no CUE in the February 1976 rating decision denying DIC benefits based on service connection for the cause of Admiral Bonner's death. The appellant argues that the Board's adverse CUE determination is erroneous because the only permissible view of the evidence in 1976 reflects that Admiral Bonner died from NHL and that VA impermissibly narrowed the scope of Mrs. Bonner's 1975 claim by ignoring other forms of cancer. The appellant's arguments are unavailing.

At the time of the February 1976 RO decision, the evidence showed that Admiral Bonner had been diagnosed with only one type of cancer, Hodgkin's disease, and that Hodgkin's disease was the cause of his death.[53] Moreover, at the time of the February 1976 RO

---

[50] 38 U.S.C. § 7104(d)(1); *see Cacciola v. Gibson*, 27 Vet.App. 45, 59 (2014); *Eddy v. Brown*, 9 Vet.App. 52, 57 (1996).

[51] *See Gilbert v. Derwinski*, 1 Vet.App. 49, 57 (1990).

[52] *See Caluza v. Brown*, 7 Vet.App. 498, 506 (1995); *Gilbert*, 1 Vet.App. at 57.

[53] R. at 157 (Aug. 1975 Autopsy Report), 1427 (Death Certificate).

decision, § 3.313—the regulation providing presumptive service connection for NHL to which the appellant points—had not yet been adopted. Indeed, it was not yet established that NHL, or Hodgkin's disease for that matter, could develop because of herbicide exposure. It was not until 1995, when VA was presented with the 1995 NIH report (new evidence) that VA was informed that Admiral Bonner's cause of death may have been NHL and not Hodgkin's disease.[54]

Based on the evidence and the law as it existed at the time, we conclude that the Board's determination that there was no CUE in the February 1976 RO decision was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. The appellant's arguments are based on evidence and law that did not exist at the time of the 1976 RO decision. Even if § 3.313's retroactive effective date would permit an award of presumptive service connection for NHL back to 1976 for DIC purposes, the record before the RO in February 1976 did not contain evidence of a diagnosis of NHL, because Admiral Bonner was not diagnosed with the condition until 1995. And even if we somehow were free to ignore that point, evidence about Admiral Bonner's cause of death that was before the RO is not undebatable. It is well established that this type of evidence cannot form the basis of CUE.[55]

---

[54] R. at 155.

[55] *See Damrel*, 6 Vet.App. at 245; *Shockley v. West*, 11 Vet.App. 208, 213 (1998).

Even if the 1995 NIH report could be considered in assessing whether CUE existed in the 1976 RO decision, and we don't think it can, we would not conclude that the 1995 NIH report undebatably showed that Admiral Bonner died because of NHL. As the Board noted, the 1995 NIH report explains why it was more likely that Admiral Bonner died of NHL instead of Hodgkin's disease, but the report also contained phrases such as "favor the diagnosis of [NHL]" and "simulating Hodgkin's disease."[56] Because that evidence reflects that Admiral Bonner could have had either Hodgkin's or NHL or perhaps even both, it is not absolutely clear that if VA had considered the 1995 NIH report it would have manifestly changed the outcome of the February 1976 RO decision.

Additionally, though the Federal Circuit in 2007 and this Court in 2005 did not address the CUE issue before us today, we cannot ignore those decisions. We must recognize that a panel of this Court, as affirmed by the Federal Circuit, determined that it was plausible that Admiral Bonner's cause of death as it was known at the time of the February 1976 RO decision was Hodgkin's disease. Similarly, these earlier decisions confirm that Mrs. Bonner's 1975 claim for DIC for "cancer" did not include a claim for other types of cancer, including NHL.[57] And finally, the Federal Circuit also concluded that the 1995 NIH report was

---

[56] R. at 155.

[57] *See Bonner II*, 497 F.3d at 1324; *Bonner I*, 19 Vet.App. at 194.

ambiguous.[58] Those decisions make it difficult—effectively impossible—to find CUE in the February 1976 decision today on the basis argued by the appellant. In other words, if the appellant's arguments concerning the cause of Admiral Bonner's death and the scope of Mrs. Bonner's claim failed on direct appeal, they must certainly fail under the significantly more stringent requirements to show CUE.

In sum, the Court concludes that the Board's determination that there was no CUE in the February 1976 RO decision was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. The Board also provided an explanation sufficiently detailed to enable the appellant to understand the basis of the Board decision and facilitate judicial review.

We end by noting that nothing in our decision should be taken as approval of how VA handled Mrs. Bonner's claim over the past 45 years. Portions of the claim's history are largely inexplicable, such as the years the Agency waited to rule on the appellant's request to be substituted in Mrs. Bonner's claim before the Agency. Moreover, if we were writing on a blank slate, we might very well have reached the same conclusion as Judge Newman did in her dissent in Mrs. Bonner's earlier appeal.[59] But we are not free to adopt

---

[58] *See Bonner II*, 497 F.3d at 1324 n.1.

[59] *Id.* at 1329-31 (Newman, J., dissenting).

a dissent, no matter how persuasive. We are left with no choice but to, reluctantly, affirm.

IV. CONCLUSION

After consideration of the parties' briefs, oral argument, the governing law, and the record, the Court AFFIRMS the November 2, 2018, Board decision.

GREENBERG, *Judge*, Dissenting:

I.

With the utmost respect for my esteemed colleagues, I have no alternative but to dissent. This is a case of statutory construction and constitutional dimension. The statutes concerning clear and unmistakable error (CUE) are clear and unambiguous, *Conroy v. Aniskoff*, 507 U.S. 511, 514, 113 S.Ct. 1562, 1564, 123 L.Ed.2d 229 (1993). The CUE statutes both plainly read that either a decision by the Secretary or Board "is subject to revision on the grounds of clear and unmistakable error. If evidence establishes the error, the prior decision shall be reversed or revised."[60] But it has been wrongly applied with a misplaced focus on protecting incorrect decisions rather than ensuring the just and correct result for the veteran. The facts of this case would justify our finding of CUE in the February 1976 rating decision and reversal of the November

[60] 38 U.S.C. §§ 5109A(a), 7111(a).

2018 Board decision. Congress created our Court in 1988 with the ability to remedy any incorrect decisions below, and enacted the CUE statutes to provide a remedy for cases wrongly decided *before* the availability of judicial review.

The medical aspects of this case should have been considered by applying the philosophy of Sir William Osler, the father of modern medicine, notably at Johns Hopkins, who famously stated *each case has its lesson – a lesson that may be, but is not always, learnt, for clinical wisdom is not the equivalent of experience. A man who has seen 500 cases of [lymphoma] may not have the understanding of the disease which comes with an intelligent study of a score of cases, so different are knowledge and wisdom*.[61] At the same time, the legal analysis should have proceeded with attention to the often paraphrased axiom of a veteran, wounded three times in the Civil War: *Great cases, like hard cases, make bad law*. *See Northern Securities Co. v. United States*, 193 U.S. 197, 364, 24 S.Ct. 436, 468, 48 L.Ed. 679 (1904) (Oliver Wendell Holmes, Jr., J. dissenting). I prefer *the truth that hard cases make good law*. *It was largely the crystallization of the rules of common law that caused constant appeals . . . and developed the system of law that we know as equity. Even the common law judges themselves had a conscience. See Arthur L.*

---

[61] *See* A. Scott, C. Ross, A. Gabali, R. Wilcox, *A Survey of the Therapeutic Landscape in Peripheral T-Cell Lymphomas: The Importance Of Expert Hematopathology Review in the Era of Targeted Therapies and Precision Medicine* ANNALS OF LYMPHOMA VOL. III. (Nov. 2019).

Corbin, HARD CASES MAKE GOOD LAW, 33 Yale Law Journal 78 (1923).

From the earliest days of the Republic, Congress has one way or another focused on invalid pensioners or veterans. *See Hayburn's Case*, 2 Dall. 409, 410 n., 1 L. Ed. 436 (1792).[62] Justice Ruth Bader Ginsburg expressed the view of the majority of the Supreme Court that this Court has the power to properly construe remedial statutes in a veteran-friendly light.[63] We should have applied this philosophy in deciding whether to reject and reverse the holding in this case.

Although I believe that this decision could and should be overturned as a matter of law, we have also missed another opportunity to act in a manner *similar to that of an Article III court when reviewing an administrative agency*[64] and exercise our equitable powers to

---

[62] Justice Ruth Bader Ginsburg, during her time as Professor at Rutgers Law School from 1962 to 1973, used *Hayburn's Case* as important evidence of the role of the federal judiciary. So did Justice Anthony Scalia at the United States Court of Appeals for Veterans Claims April 2013 Judicial Conference. He made specific reference to the importance of *Hayburn's Case* in the jurisprudence of the Court. *Supreme Court Press Release for Ruth Bader Ginburg's Death*, https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_09-18-20; *see also Justice Scalia Headlines the Twelfth CAVC Judicial Conference*, http://www.cavcbar.net/Summer% 202013% 20VLJ% 20Web.pdf (referencing *Hayburn's Case* and noting that "veterans are favored by a unique canon of interpretation.") (last visited Sep. 23, 2020).

[63] *See Scarborough v. Principi*, 541 U.S. 401, 411-19, 124 S. Ct. 1856, 1864-69, 158 L.Ed.2d. 674 (2004).

[64] *See also Henderson v. Shinseki*, 131 S.Ct. 1197,1205, n.2; 562 U.S. 428, 432 n.2, 179 L.Ed.2d 159 n.2 (2011) (declaring that

ensure the veteran friendly system created by Congress[65] is justly administered. Well established judicial philosophy notes that courts are always open to fashion a remedy. Going further, if the creators of a legislative scheme gave a class of peoples any rights, administrators of that law should uphold that right, and not limit its effectiveness. *See Driscoll v. Burlington-Bristol Bridge Co.*, 8 N.J. 433, 86 A.2d 201 (1952) (Vanderbilt, C.J.); *see also Johnson v. Christ Hospital*, 45 N.J. 108, 113, 211 A.2d 376, 379 (1965) (per curiam) *affirmed for reasons stated below*, *Johnson v. Christ Hospital*, 84 N.J. Super. 541, 202 A.2d 874 (1964) (Matthews, Ch. Div.); *see also Yick Wo v. Hopkins*, 118 U.S. 356, 366 (1886) (Matthews, J.).

II.

I agree with the frequently expressed sentiments of the late Justices Ruth Bader Ginsburg and William J. Brennan Jr. in the matter of dissents:

> Dissents speak to a future age. It's not simply to say, "[m]y colleagues are wrong and I would do it this way." But the greatest dissents do become court opinions and gradually over

---

congressional solicitude for veterans is plainly reflected in "the singular characteristics of the review scheme that Congress created for the adjudication of veterans' benefits claims," and emphasizing that the provision "was enacted as part of the VJRA [because] that legislation was decidedly favorable to the veteran")

[65] Veterans Judicial Review Act (VJRA), 102 Stat. 4105 (codified, as amended, in various sections of 38 U.S.C. (2006 ed. and Supp. III)) §§ 7251, 7252 (a)(2006 ed.).

> time their views become the dominant view. So that's the dissenter's hope: that they are writing not for today, but for tomorrow.[66]
>
> Dissent for its own sake has no value. . . . However, where significant and deeply held disagreement exists, members of the Court have a responsibility to articulate it. . . . Unanimity is not in and of itself a judicial virtue. . . . Judges have no power to *declare* law. Courts *derive* legal principles and have a duty to explain *why* and *how* a given rule has come to be. . . . [Judges] are forced by a dissent to reconsider the fundamental questions and rethink the result. . . . In my judgment . . . the unique interpretive role of [our Court] with respect to the Constitution [and our authority] demands some flexibility with respect to the call of stare decisis. . . . [We should not be] captive to the anachronistic view of long-gone generations. . . . The right to dissent is one of the great and cherished freedoms by reasons of the excellent accident of our American births.[67]

---

[66] *Ruth Bader Ginsburg Interview*, https://www.npr.org/templates/story/story.php?storyId=1142685 (timestamp 3:50-4:05).

[67] William J. Brennan Jr., *In Defense of Dissents*, 37 Hastings L.J. 427, 427-35 (1985) (emphasis in original). Justice William J. Brennan Jr. practiced law in New Jersey, served in the United States Army during World War II, served on the Superior Court of New Jersey from 1949 to 1951, and served on the Supreme Court of New Jersey until 1956 when he was nominated as a recess appointment by President Eisenhower. Justice Brennan also expressed his strongly held view of veterans as a unique class of litigants, while adhering to customary notions of constitutional and statutory construction. *See Johnson v. Robison*, 415 U.S. 361,

III.

Admiral Emmet P. Bonner served on active duty in the U.S. Navy from June 1939 to April 1972, including service in World War II, Korea, and Vietnam.[68] The veteran was awarded many decorations for his meritorious service including the Legion of Merit, Joint Service Commendation Medal, World War II Victory Medal, Korean Service Medal, National Defense Medal with one star, and the Vietnam Service Medal.[69] I would have analyzed a service record of four decades and three wars, together with the frequent exposure to cancer-causing chemicals as worthy of judicial review analogous to that of the implied covenant of good faith and fair dealing in all contracts. *See Wood v. Lucy, Lady Duff-Gordon*, 222 N.Y. 88, 118 N.E. 214 (1917) (Cardozo, J.) Surely, Admiral Bonner had a right to expect a government that put him in harms way, thereby causing the harm, would acknowledge responsibility and adequate compensation.

IV.

The pertinent facts of this case were more than adequately set out by Judge Newman in her 2007

---

94 S.Ct. 1160, 39 L.Ed.2d 389 (1974). Long before our Court was created by Congress in 1988, Justice Brennan recognized that there was no bar to consideration of a veterans constitutional claims. *Johnson v. Robison*, *supra* at 367.

[68] R. at 230. (DD Form 214).

[69] *Id.*

dissent.[70] While stationed in the South Pacific, the veteran was exposed to radiation as an onsite participant in nuclear testing, and exposed to Agent Orange and other herbicides in the Republic of Vietnam.[71] The veteran died in August 1975, from cancer, which was misdiagnosed as Hodgkin's disease.[72]

V.

In September 1975, the veteran's widow applied for Dependency and Indemnity Compensation (DIC) benefits claiming that the veteran died from *cancer* that stemmed from his military service.[73] In February 1976, the regional office (RO) denied the widow's DIC claim, mistakenly finding the veteran died from Hodgkin's disease, which was not caused by service.[74]

VI.

In June 1995, the National Institutes of Health (NIH) reviewed the August 1975 autopsy report and a group of cell tissue slides preserved from the veteran's

---

[70] *See Bonner v. Nicholson*, 497 F.3d 1323, 1329-31. (Fed. Cir. 2007).

[71] *Id.* at 1329.

[72] Compare R. at 1427, *with* 155; *see also Bonner*, 497 F.3d at 1330, (J. Newman, dissenting) (citing the 1995 NIH report noting the veteran's diagnosis favored non-Hodgkin's lymphoma (NHL) and the September 2001 Board decision that sets forth the finding of fact that the veteran's diagnosis of Hodgkin's lymphoma was in error and that the veteran actually died of NHL.)

[73] R. at 20.

[74] R. at 1644, R. at 1427, 1680.

autopsy, evidence that existed at the time of the February 1976 denial, and concluded that the veteran's diagnosis "favored" NHL.[75] In November 1995, the widow received the June 1995 NIH report, and applied for retroactive benefits,[76] but because VA "refused to correct the error in [the veteran's records],"[77] the RO awarded DIC benefits effective November 1994, but no earlier.[78]

VII.

A long and arduous appeals process began, which culminated in an August 2007 Federal Circuit decision,[79] where the Federal Circuit noted that "[t]he only way the RO's unappealed 1976 decision can be collaterally attacked is through a claim of 'clear and unmistakable error (CUE).'"[80] In June 2008, the widow submitted a motion alleging CUE in the February 1976 rating decision,[81] which was denied in July 2009.[82] On October 6, 2010, VA was notified about the widow's unfortunate death,[83] which prompted quick action by VA a mere 6 days later on October 12, 2010, denying the

---

[75] R. at 151-56.

[76] R. at 1523-24.

[77] *See Bonner*, 497 F.3d at 1330.

[78] R. at 1507.

[79] *See Bonner v. Nicholson*, 19 Vet.App. 188 *aff'd by Bonner*, 497 F.3d at 1323.

[80] *Bonner*, 497 F.3d at 1327, n. 3.

[81] R. at 859-70.

[82] R. at 682-87.

[83] R. at 657.

widow's claim that the February 1976 rating decision denying DIC benefits contained CUE.[84]

VIII.

The matter continued through its procedural and bureaucratic labyrinth for several years[85] before it came before the Board again in November 2018.[86] The Board ultimately concluded that there was no CUE in the February 1976 rating decision, and thus "no new benefits are being awarded by the Board, and the Board need not address the appellant's benefit distribution arguments at this time."[87] This appeal ensued.

IX.

The appellant's position was that if the September 1975 claim is still open, and if the 1995 NIH report diagnosed an NHL diagnosis, then the Board erred in denying the 1975 claim if that claim raised NHL.[88] The appellant alternatively argues that equitable estoppel or other equitable remedies should be available based

---

[84] R. at 636-48.

[85] *See* R. at 542-45; *see also* R. at 29.

[86] R. at 3-12.

[87] R. at 4. Although the Board did not reach this question and thus it is not before the Court, my views on benefits being properly disbursed to deserving recipients remains unchanged. *See Staab v. McDonald*, 28 Vet.App. 50 (2016) (J. Greenberg, majority).

[88] *Bonner v. Wilkie*, 18-6927 October 23, 2020, Oral Argument, https://www.youtube.com/watch?v=U-gZ88tipkg (Appellant's argument starting at 42:46 to 43:18) (last visited Dec. 23, 2020).

on the VA's inadequate notice of denial of benefits, delay, and other "deceitful or fraudulent actions" that caused harm.[89] The appellant further requests the Court to set aside the Board's denial of benefits as contrary to the widow's Constitutional right of due process.[90]

X.

Regarding the September 1975 claim still being open, the appellant argued there was CUE in the February 1976 rating decision because VA failed to properly apply 38 C.F.R. § 3.312[91] when it narrowed the claim for cause of death to only Hodgkin's lymphoma and denied the widow's DIC claim.[92] The evidence was clear that the veteran served in the Republic of Vietnam, was on site during H-bomb tests, and was exposed to other carcinogens such high energy radar from missiles on warships, and that if such evidence was properly considered, as the regulation requires, it would be undisputed that the veteran's cause of death,

---

[89] *Bonner v. Wilkie*, 18-6927 October 23, 2020, Oral Argument, https://www.youtube.com/watch?v=U-gZ88tipkg (Appellant's argument starting at 36:01) (last visited Dec. 23, 2020).

[90] *Bonner v. Wilkie*, 18-6927 October 23, 2020, Oral Argument, https://www.youtube.com/watch?v=U-gZ88tipkg (Appellant's argument starting at 3:43 to 28:37) (last visited Dec. 23, 2020).

[91] 38 C.F.R. § 3.312 requires adjudicators to "exercise of sound judgment, without recourse to speculation, after a careful analysis has been made of all the facts and circumstances surrounding the death of the veteran, including, particularly, autopsy reports" in determining cause of death claims.

[92] Appellant's Brief at 14.

claimed by the widow as cancer, was related to service. The appellant also argued that the fact that the 1995 NIH report and autopsy was done using evidence from the 1975 autopsy,[93] and definitively shows that the veteran actually died from NHL indicates that the 1976 diagnosis and denial based on Hodgkin's lymphoma further contains CUE. Alternatively, the appellant argued that if CUE does not apply, the 1975 claim is still open because the February 1976 "checkbox notice" denial was inadequate notice of denial, and did not give the widow the proper appellant rights.[94]

Responding to concerns that his arguments were precluded by collateral estoppel, the appellant noted that collateral estoppel is an equitable doctrine and litigants who invoke it must have clean hands, and that courts should not apply it in favor of parties that have acted fraudulently or by deceit.[95] The appellant noted that the widow first filed her CUE motion in June 2008, and requested expeditious treatment.[96] Yet VA took 3,802 days, over 10 years after the initial motion was filed, to issue a Board decision in November 2018. Further, throughout the time on appeal, VA has advanced an argument that the 1995 diagnosis was

---

[93] R. at 154

[94] *See Ruel v. Wilkie*, 918 F.3d 939, 942 (Fed. Cir. 2019) (holding that to meet the notice requirements of VA regulations, an explicit denial must state, or clearly identify in some other manner, the claim(s) being denied)

[95] *Bonner v. Wilkie*, 18-6927 October 23, 2020, Oral Argument, https://www.youtube.com/watch?v=U-gZ88tipkg (Appellant's argument starting at 13:45) (last visited Dec. 23, 2020).

[96] Appellant's Brief at 26.

unclear, by characterizing it by saying that the evidence "favors *a* diagnosis" of NHL, rather than "favors *the* diagnosis"[97] of NHL which casts doubt upon the certainty of the 1995 diagnosis. The appellant argues these examples of unclean hands would support the Court's decision to apply equitable estoppel principles in this veteran-friendly area of the law, and thus should keep the case open.

The appellant also asserted his arguments were not foreclosed by the 2005 CAVC or 2007 Federal Circuit case because the Federal Circuit found that issue veteran's cause of death was not actually decided by CAVC because CAVC found that "it could not conclude that the veteran died from NHL" and ultimately "did not need to reach the issue of cause of death." Further, the appellant argues that because the Board never raised issue preclusion themselves, thus any arguments now are merely a post hoc argument.

XI.

I agree that the Court could rule in favor of the appellant as a matter of Constitutional dimension regarding due process, statutory construction of the CUE statute, and the 1976 RO's misapplication of the veteran-friendly regulation. As Judge Newman correctly stated, the facts plainly show that the veteran actually died of NHL, the 1975 autopsy report was incorrect, and that the Board should have corrected the autopsy, particularly considering the new diagnosis was made

[97] R. at 151-52.

examining evidence that existed at the time of the February 1976 rating decision. Unfortunately, the majority classifies the 1995 NIH report as "new evidence," fails to plainly state that the veteran died from NHL and was clearly misdiagnosed in 1975, and concludes that collateral estoppel, or issue preclusion, prevent us from considering these arguments on the merits.[98] Surely, VA would not argue that the veteran's condition had changed between his death in 1975 and the 1995 corrected diagnosis. Yet, based the heightened standard shielding decisions from full judicial review on a basis known as CUE, the widow was never awarded her Constitutionally entitled DIC benefits.[99] The widow's claim was eventually denied by this Court in 2005 and affirmed by the Federal Circuit in September 2007, which the majority believes even further narrows our jurisdiction here.[100]

XII.

However, this downstream earlier adjudication of CUE that ties our hands today and protects a wrongly decided February 1976 decision violates Congressional intent of creating a special class of litigants which this Court was designed to protect.[101] After all, the CUE

---

[98] *see supra* section III.B, p.8.

[99] R. at 576-85.

[100] *See supra* Section II.A.

[101] *See Henderson*, 131 S.Ct. at 1202, n.2; 562 U.S. at 440, 179 L.Ed.2d at 159 (2011) (declaring that congressional solicitude for veterans is plainly reflected in "the singular characteristics of the review scheme that Congress created for the adjudication of

statutes both plainly read that either a decision by the Secretary or Board "is subject to revision on the grounds of clear and unmistakable error. If evidence establishes the error, the prior decision shall be reversed or revised."[102]

XIII.

I am not unmindful of the substantial history of judicial review surrounding these statutes.[103] Nevertheless, with great respect, I firmly believe courts have misconstrued Congressional intent and the plain language of the statutes.[104] CUE has been wrongly interpreted to focus on the finality of a decision based on arbitrary deadlines, when it should be whether the final decision is correct. For too long, the Court has afforded misplaced protections to incorrectly decided rating and Board decisions often to the detriment of the veteran. Congress plainly drafted 38 U.S.C. §§ 5109A and 7111 as remedial statutes for veterans to seek redress of wrongly decided decisions, particularly before judicial remedies were made available to them via creation of this Court. Although the standard set for obtaining revision of a decision based on CUE is high, it would be absurd to assume that undisputed errors by VA should be insulated from collateral attack

---

veterans' benefits claims," and emphasizing that the provision "was enacted as part of the VJRA [because] that legislation was decidedly favorable to the veteran")

[102] 38 U.S.C. §§ 5109A(a), 7111(a).

[103] *See supra* Section III.C

[104] *Conroy*, 507 U.S. at 514.

merely because they happened to be the "right" kind of error.

XIV.

The veteran's canon, reflecting Congressional intent to presume interpretive doubt in the veteran's favor, has always been consistent, and remains paramount. *See Shinseki v. Sanders*, 556 U.S. 396, 416, 129 S.Ct. 1696, 173 L.Ed.2d 532 (2009) (Souter, J., *dissenting*) (stating that Congressional "solicitude [for veterans] is plainly reflected in the [Veterans Judicial Review Act of 1988], 38 U.S.C. § 7251 et seq.], as well as in subsequent laws that 'place a thumb on the scale in the veteran's favor in the course of administrative and judicial review of VA decisions' ") (quoting *Henderson v. Shinseki*, 131 S.Ct. 1197,1205 (2011)). As Justice Alito has recognized, "we have long applied 'the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor." *Id.* at 1206 (quoting *King v. St. Vincent's Hospital*, 502 U.S. 215, 220-21 N. 9, 112 S.Ct. 570, 116 L. Ed. 2d 578 (1991)). *See United States v. Oregon*, 366 U.S. 643, 647, 81 S. Ct. 1278,6 L.Ed. 2d 575 (1961) ("The solicitude of Congress for veterans is of long standing.")

XV.

Therefore, even if the CUE statute has been correctly interpreted and applied, this Court can still correct this obvious wrong. One thing that distinguishes this Court from the Board is the ability to fashion a

just result consistent with Congressional intent, which the I believe we have once again missed an opportunity to do. *See Bly v. McDonald*, 28 Vet.App. 256, 265-66 (2016) (J. Greenberg, dissenting) *vacated and remanded by Bly v. Shulkin*, 883 F.3d 1374 (Fed. Cir. 2018); *see also Ollis v. McDonald*, 27 Vet.App. 405, 414-15 (2015) (J. Greenberg, dissenting) *aff'd in part, vacated in part, and remanded by Ollis v. Shulkin*, 857 F.3d 1338 (Fed. Cir. 2017); *see also James v. Shulkin*, 29 Vet.App. 127, 130-31 (2017) (J. Greenberg, dissenting) *vacated and remanded by James v. Wilkie*, 917 F.3d 1368 (Fed. Cir. 2019)(citing *Henderson* when noting the need for flexibility in applying rules in the uniquely pro-claimant arena of veterans benefits law); *see also Taylor v. Wilkie*, 31 Vet.App. 147, 155-62 (J. Greenberg, dissenting).

While the Court acknowledges "the justice of [veterans'] claims and the meritorious character of the claimants," *United States v. Yale Todd* (1794) (unreported decision discussed in the margin of the opinion in *United States v. Ferreira*, 54 U.S. 40 (1852) (Taney, C.J.)), it once again fails to consider equitable maxims in deciding this case.

XVI.

Thus, while I agree with my colleagues that finality is an important principle that should not be hastily and thoughtlessly abridged, I cannot join in considering it an immutable ratification for undisputed errors. For far too long this Court has limited its own powers

in equity, shying away from fulfilling express Congressional intent of benefiting this nation's veterans. If there was ever a case for the Court to set precedent of exercising its equitable powers bestowed upon it by Congress, it is this one. The veteran served the United States honorably for over four decades and multiple conflicts and wars, and left behind his wife and children after dying from cancer due to herbicide and radiation exposure. For this Court to ignore the "obligatory veteran-friendly positions of the law" and deny a veteran, or his or her family, deserved benefits based on a "hypertechnical reason whereby [our Court] refused to consider the merits of [the appellant's] claim"[105] of CUE is a travesty that plainly conflicts with Congressional intent in creating a veteran-friendly system. This unfortunate result is only compounded in light of VA's "largely inexplicable"[106] delays over the 45 years the veteran's family has sought benefits, and, at best, nonfeasance in adjudicating the widow's claim. Any argument that the appellant is not entitled to equitable relief from VA ignores congressional intent and the reason this Court was created.[107]

This case is illustrative of systemic legal errors that can be corrected by our Court. *See Mathis v. Shulkin*, 137 S. Ct. 1994 (Sotomayor, J., dissenting) (noting the continuing "dialogue over whether the

---

[105] *Bonner*, 497 F.3d at 1331 (J. Newman, dissenting).

[106] *See supra*, section III.C, p. 13.

[107] VJRA, 102 Stat. 4105 (codified, as amended, in various sections of 38 U.S.C. (2006 ed. and Supp. III)) §§ 7251, 7252 (a)(2006 ed.).

current system for adjudicating veterans disability claims can be squared with VA's statutory obligations to assist veterans in the development of their disability claims."); (Gorsuch, J., dissenting) ("Congress imposed on the VA an affirmative duty to assist—not impair—veterans seeking evidence for their disability claims."). The conduct of VA here is certainly emblematic of a systemic, bureaucratic disorder, which we are uniquely ordained to deal with. We should have done so here.

XVII.

"[F]iat justicia, ruat caelum, let justice be done whatever be the consequence." *Somerset v. Stewart*, (1772) 98 Eng. Rep. 499 (K.B.) 509 (Lord Mansfield). "The courts can exercise only the judicial power, can apply only law, and must abide by the Constitution, or they cease to be civil courts and become instruments of military policy." *See Korematsu v. United States*, 323 U.S. 214, 247, 65 S.Ct. 193, 208, 89 L.Ed. 194, 247 (Jackson, J. dissenting). For these reasons, I dissent.

[SEAL] **BOARD OF VETERANS' APPEALS**
DEPARTMENT OF VETERANS AFFAIRS

IN THE APPEAL OF XC 28 350 643
MARK H. BONNER Docket No. 10-48 532
IN THE CASE OF
EMMETT P. BONNER

DATE: November 2, 2018

ORDER

The final February 9, 1976 Department of Veterans Affairs (VA) Regional Office (RO) rating decision denying service connection for the cause of the Veteran's death was not clearly and unmistakably erroneous (CUE).

FINDINGS OF FACT

1. The February 9, 1976 RO rating decision denying service connection for the cause of the Veteran's death became final.

2. The evidence has not established, without debate, that the correct facts, as then known, were not before the RO at the time of the February 9, 1976 rating decision, or that the RO incorrectly applied the applicable laws or regulations existing at the time.

CONCLUSION OF LAW

The final February 9, 1976 rating decision denying service connection for the cause of the Veteran's death was not clearly and unmistakably erroneous. 38 U.S.C.

§ 5109A, 7105 (2012); 38 C.F.R. § 3.105, 3.156, 20.302, 20.1103 (2017).

REASONS AND BASES FOR FINDINGS AND CONCLUSION

The Veteran served on active duty from June 1939 to April 1972. The Veteran died in August 1975. The original appellant in this matter was the surviving spouse of the Veteran, who passed away in September 2010. The current appellant is the adult child of the former appellant, who has been substituted as the appellant for purposes of adjudicating the issue on appeal to completion. See 38 U.S.C. § 5121A (2012) (allowing for substitution in case of death of a claimant who dies on or after October 10, 2008).

This matter came before the Board of Veterans' Appeals (Board) on appeal from a July 2009 rating decision of the RO in Baltimore, Maryland. This matter was first before the Board in August 2012, where the Board dismissed the appeal due to the death of the first appellant, the surviving spouse of the Veteran. Per a September 2018 letter, the current appellant, who is the former appellant's adult son, was substituted based on reimbursement as the appellant for purposes of adjudicating the issue of whether the February 9, 1976 rating decision, which denied service connection for the cause of the Veteran's death, was not final or was clearly and unmistakably erroneous. The current appellant testified at a May 2012 Central Office hearing before the undersigned Veterans

Law Judge. The hearing transcript has been associated with the record.

The Board notes that at the May 2012 hearing the current appellant made a number of arguments, including constitutional arguments, as to how any granted benefits should be awarded in the instant matter. As the instant decision does not find CUE in the February 9, 1976 rating decision, no new benefits are being awarded by the Board, and the Board need not address the appellant's benefit distribution arguments at this time.

The Veterans' Claims Assistance Act of 2000 (VCAA) enhanced VA's duty to notify and assist claimants in substantiating their claims for VA benefits. 38 U.S.C. §§ 5100, 5102, 5103, 5103A, 5107, 5126 (2012); 38 C.F.R. §§ 3.102, 3.156(a), 3.159, 3.326(a) (2017). VA's duties to notify and assist claimants under the VCAA do not apply to claims alleging CUE. Parker v. Principi, 15 Vet. App. 407 (2002); Livesay v. Principi, 15 Vet. App. 165, 179 (2001) (en banc). Therefore, no further discussion of VCAA duties to notify or assist will take place regarding the CUE issue on appeal.

CUE in February 9, 1976 Rating Decision Denying Service Connection for Cause of the Veteran's Death

The instant matter has been pending for approximately a decade, and in that time multiple CUE arguments have been made. Such arguments can be found within the original June 2008 CUE claim, lay statements provided in September 2008, December 2010, and October 2015, in testimony at the May 2012

Central Office hearing, and elsewhere throughout the record. The Board has reviewed and considered all of the relevant arguments, documents, and other supporting records in the instant decision. Here, in the decision below, the Board addresses what it finds to the be the relevant CUE arguments contained within the record.

Previous determinations that are final and binding, including decisions of service connection and other matters, will be accepted as correct in the absence of CUE. Where evidence establishes such error, the prior rating decision will be reversed or amended. For the purpose of authorizing benefits, the rating or other adjudicatory decision which constitutes a reversal of a prior decision on the grounds of CUE has the same effect as if the corrected decision had been made on the date of the reversed decision. 38 C.F.R. § 3.105(a).

CUE is a very specific and rare kind of "error." It is the kind of error, of fact or of law, that when called to the attention of later reviewers compels the conclusion, to which reasonable minds could not differ, that the result would have been manifestly different but for the error. Simply to claim CUE on the basis that previous adjudications had improperly weighed and evaluated the evidence can never rise to the stringent definition of CUE. Similarly, neither can broad-brush allegations of "failure to follow the regulations" or "failure to give due process," or any other general, nonspecific claim of "error." Fugo v. Brown, 6 Vet. App. 40, 43-44 (1993). In addition, failure to address a specific regulatory provision involves harmless

error unless the outcome would have been manifestly different. Id. at 44.

The United States Court of Appeals for Veterans Claims (Court) has held that there is a three-pronged test to determine whether CUE is present in a prior determination: (1) "[e]ither the correct facts, as they were known at the time, were not before the adjudicator (i.e., more than a simple disagreement as to how the facts were weighed or evaluated) or the statutory or regulatory provisions extant at the time were incorrectly applied," (2) the error must be "undebatable" and of the sort "which, had it not been made, would have manifestly changed the outcome at the time it was made," and (3) a determination that there was CUE must be based on the record and law that existed at the time of the prior adjudication in question. Damrel v. Brown, 6 Vet. App. 242, 245 (1994) (quoting Russell v. Principi, 3 Vet. App. 310, 313-14 (1992) (en banc)).

The Court has held that allegations that previous adjudications had improperly weighed and evaluated the evidence can never rise to the stringent definition of clear and unmistakable error. See Baldwin v. West, 13 Vet. App. 1, 5 (1999); Damrel, 6 Vet. App. at 246.

If a veteran wishes to reasonably raise a claim of CUE, there must be some degree of specificity as to what the alleged error is and, unless it is the kind of error that, if true, would be CUE on its face, persuasive reasons must be given as to why one would be compelled to reach the conclusion, to which reasonable minds could

not differ, that the result would have been manifestly different but for the alleged error. Bustos v. West, 179 F.3d 1378, 1381 (Fed. Cir. 1999), cert. denied, 528 U.S. 967 (1999); Fugo, 6 Vet. App. at 43-44. If the error alleged is not the type of error that, if true, would be CUE on its face, if the veteran is only asserting disagreement with how the RO evaluated the facts before it, or if the veteran has not expressed with specificity how the application of cited laws and regulations would dictate a "manifestly different" result, the claim must be denied or the appeal to the Board terminated because of the absence of legal merit or the lack of entitlement under the law. Luallen v. Brown, 8 Vet. App. 92 (1995); Caffrey v. Brown, 6 Vet. App. 377, 384 (1994). Further, VA's failure in the duty to assist cannot constitute CUE. See Cook v. Principi, 318 F.3d 1334, 1346 (Fed. Cir. 2003).

The Board notes that the February 9, 1976, rating decision became final, as the original appellant did not file a timely NOD to the rating decision and no new and material evidence was received during the one-year appeal period following that decision. See 38 U.S.C. § 7105; 38 C.F.R. §§ 3.156, 20.302, 20.1103.

During the course of this appeal, the appellant has argued that the February 9, 1976 rating decision is not final. While the appellant has made various arguments concerning finality during the course of this appeal, including an equitable tolling argument, the Board finds that the appellant has made essentially two arguments as to why the February 9, 1976 rating decision was not final. First, it is argued that the original

appellant was not provided with information necessary to appeal the original service connection for cause of death denial. Second, it is argued that February 9, 1976 rating decision did not become final because the RO failed to consider whether service connection for cause of death could have been granted on the basis of death due to Non-Hodgkin's lymphoma (NHL).

As to the first argument, the record reflects that in March 1976 the appellant was sent a VA letter informing that the service connection for cause of death claim had been denied. Enclosed with the letter was a notice of procedural and appeal rights. As such, the Board finds that the prior appellant was properly informed of both the denial of the claim and the appropriate avenue to appeal the denial.

As for the argument that the RO failed to consider whether service connection for cause of death could have been granted based upon NHL, in the original September 1975 claim for Dependency and Indemnity Compensation (DIC), the original appellant advanced that the veteran died of cancer. Per the Veteran's August 1975 certificate of death, the cause of death was Hodgkin's Disease, which is a malignant lymphoma (cancer). DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 535 (32nd ed. 2012). Further, the report from the August 1975 autopsy conveyed that the Veteran's undifferentiated tumor was most consistent with Hodgkin's Disease. As such, in the February 1976 rating decision, the RO denied service connection for cause of death because the Veteran's Hodgkin's Disease (cancer) was found to not be caused by service. None of

the available medical evidence at the time mentioned or diagnosed NHL, and the original appellant made no mention of NHL in the DIC claim. Rather, the original appellant claimed that the Veteran died of cancer, which is exactly what the RO considered in the February 1976 rating decision (death due to Hodgkin's Disease, which is cancer). Although the appellant contends that the claim should have been considered broadly, the medical evidence existing at the time specified that the death was from Hodgkin's disease. Therefore, the Board does not find that the February 9, 1976 rating decision remained open due to any unadjudicated issues.

Even assuming, arguendo, that the February 9, 1976 rating decision did not become final after the one year appeal period, the question of service connection for the Veteran's cause of death was readjudicated, and granted, in a November 1995 rating decision. An effective date of November 1, 1994 was assigned, which the original appellant appealed. Eventually, the question of an effective date earlier than November 1, 1994 was denied by the Board in a September 2001 decision.

RO decisions that are appealed to the Board become subsumed by the Board decision issued in that case. See Brown v. West, 203 F.3d 1378, 1381 (Fed. Cir. 2000). As such, if the February 9, 1976 rating decision was non-final, then the rating decision at issue would be the November 1995 rating decision, which was subsumed by the September 2001 Board decision. RO CUE and Board CUE are two distinct issues with different procedural requirements and concerns. See 38

U.S.C. § 7111 (2012); 38 C.F.R. §§ 20.1400-1411 (2017) (procedural requirements for Board CUE claims). As such, if the Board were to find that the February 9, 1976 rating decision did not become final, the proper course of action would be for the Board to dismiss the current appeal, as the Board does not currently have jurisdiction over the question of whether there was CUE in the September 2001 Board decision denying an earlier effective date for the grant of service connection for the cause of the Veteran's death However, as the Board finds that the February 9, 1976 rating decision did become final, the Board does not find dismissal appropriate.

Next, the Board finds the allegations of CUE made by the appellant are adequate to meet the threshold pleading requirements. See Simmons v. Principi, 17 Vet. App. 104 (2003); Phillips v. Brown, 10 Vet. App. 25 (1997) (distinguishing denial of CUE due to pleading deficiency and denial of CUE on merits). Such allegations are addressed below.

Throughout the course of this appeal the appellant has argued that the RO erred in its application of 38 C.F.R. § 3.313 (2017), which concerns claims based upon service in the Republic of Vietnam. The appellant's argument seems to be based upon the fact that 38 C.F.R. § 3.313 has an effective date of August 5, 1964, which predates the February 9, 1976 rating decision at issue. However, while the effective date for 38 C.F.R. § 3.313 does, indeed, predate the rating decision at issue, the regulation itself was not enacted until 1990, which was almost 15 years after the February 9, 1976 rating

decision on appeal. Claims Based on Service in Vietnam, 55 Fed. Reg. 43, 123-01 (October 26, 1990). As discussed above, a determination that there was CUE must be based on the record and law that existed at the time of the prior adjudication in question. Damrel, 6 Vet. App. at 245. As 38 C.F.R. § 3.313 was not enacted until 1990, well after the February 9, 1976 rating decision at issue, any alleged error under 38 C.F.R. § 3.313 cannot constitute the basis of CUE in the February 9, 1976 rating decision on appeal.

During the course of this appeal the appellant has also effectively argued that 38 C.F.R. § 3.313 was misapplied at the time of the November 1995 rating decision assigning an effective date of November 1, 1994 for the grant of service connection for the cause of the Veteran's death. As discussed above, the November 1995 rating decision has been subsumed by a September 2001 Board decision, and the Board does not currently have jurisdiction over the question of whether there was CUE in the September 2001 Board decision denying an earlier effective date for the grant of service connection for the cause of the Veteran's death. As such, the Board need not consider this alternate theory of CUE under 38 C.F.R. § 3.313 in the instant decision.

The other significant CUE argument raised by the appellant is that the RO, in February 1976, committed CUE when it failed to consider whether the Veteran's death was caused by NHL. Had the RO not committed this factual error, service connection for the cause of the Veteran's death due to NHL would have been granted in the February 9, 1976 rating decision.

The relevant factual evidence was already discussed above. In the September 1975 DIC claim, the original appellant advanced that the Veteran died of cancer. Per the Veteran's August 1975 certificate of death, the cause of death was Hodgkin's Disease, which is a malignant lymphoma (cancer). DORLAND'S at 535. Further, the report from the August 1975 autopsy found that the Veteran's undifferentiated tumor was felt to be most consistent with Hodgkin's Disease. None of the medical records available to the RO at the time of the Veteran's death indicated that the Veteran may have been diagnosed with, or treated for, NHL.

In making the above argument, the appellant relies on a June 1995 report from the National Institutes of Health indicating that it was likely that the Veteran had actually died of NHL rather than Hodgkin's Disease. This evidence was not of record at the time the February 9, 1976 rating decision. As discussed above, a determination that there was CUE must be based on the record and the law that existed at the time of the rating decision being challenged. Damrel, 6 Vet. App. at 245.

The appellant has also argued that, even if the June 1995 report cannot be used to directly support the CUE argument, the report has a tendency to show that the Veteran was misdiagnosed with Hodgkin's Disease, as opposed to NHL, at the time of death. In the June 2008 CUE claim, the appellant even requested that the Board obtain a VA medical opinion concerning whether a competent examiner in 1975 would have found that the Veteran actually had actually died of NHL, rather

rather than Hodgkin's Disease. While the Board is sympathetic to the contention of a misdiagnosis and the request for a retrospective opinion, such an assertion cannot rise to the level of CUE. The pertinent law reflects that medical personnel are not adjudicators and, as such, cannot commit CUE. See Henry v. Derwinski, 2 Vet. App. 88, 90 (1992); see also Shockley v. West, 11 Vet. App. 208 (1998) (a claim of misdiagnosis could be interpreted as either assertion of failure to satisfy duty to assist or disagreement with weighing of facts, neither of which can be clear and unmistakable error).

In the original June 2008 CUE claim, and elsewhere throughout the record, the appellant has argued that, even when the June 1995 report is not considered, at the time of the February 9, 1976 rating decision there was "litany" of evidence that the Veteran' cancer was not consistent with Hodgkin's Disease, and that "a reasonably prudent reviewer" would have found that it was likely that the Veteran was misdiagnosed with Hodgkin's Disease and would have also considered whether service connection for the cause of the Veteran's death due to NHL was warranted. As the vast majority of evidence available to the RO at the time of the February 9, 1976 rating decision indicated that the Veteran died of Hodgkin's Disease, the Board finds this argument to be nothing more than a disagreement with how the facts were weighed and evaluated, which is explicitly not CUE. Damrel, 6 Vet. App. at 245; Fugo, 6 Vet. App. at 43-44.

Review of the record reflects no other significant CUE arguments raised by the appellant; therefore, for the

above stated reasons, the Board finds there was no CUE in the February 9, 1976 rating decision denying service connection for the cause of the Veteran's death.

/s/ J.W. Francis

J.W. FRANCIS
Veterans Law Judge
Board of Veterans' Appeals

ATTORNEY FOR THE BOARD E. Blowers, Counsel

NOTE: This order is nonprecedential.

United States Court of Appeals for the Federal Circuit

MARK H. BONNER,
Claimant-Appellant

v.

DENIS MCDONOUGH, SECRETARY OF VETERANS AFFAIRS,
Respondent-Appellee

2021-1817

Appeal from the United States Court of Appeals for Veterans Claims in No. 18-6927, Chief Judge Margaret C. Bartley, Judge Michael P. Allen, Judge William S. Green-berg.

ON PETITION FOR PANEL REHEARING AND REHEARING EN BANC

(Filed Mar. 1, 2022)

Before MOORE, *Chief Judge*, NEWMAN, LOURIE, DYK, PROST, O'MALLEY, REYNA, TARANTO, CHEN, HUGHES, STOLL, and CUNNINGHAM, *Circuit Judges*.

PER CURIAM.

ORDER

Mark H. Bonner filed a combined petition for panel re-hearing and rehearing en banc. The petition was referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc was referred to the circuit judges who are in regular active service.

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for panel rehearing is denied.

The petition for rehearing en banc is denied.

The mandate of the court will issue March 8, 2022.

FOR THE COURT

March 1, 2022
Date

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court

Elizabeth H. BONNER,
Claimant-Appellant,

v.

R. James NICHOLSON,
Secretary of Veterans Affairs,
Respondent-Appellee.

No. 2005-7190.

United States Court of Appeals,
Federal Circuit.

Aug. 16, 2007.

Mark Healy Bonner, of Great Falls, Virginia, argued for claimant-appellant.

Leslie Cayer Ohta, Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, argued for respondent-appellee. With her on the brief were Peter D. Keisler, Assistant Attorney General, and Bryant G. Snee, Assistant Director. Of counsel on the brief were David J. Barrans, Deputy Assistant General Counsel, and Jamie L. Mueller, Attorney, United States Department of Veterans Affairs, of Washington, DC.

Before NEWMAN, Circuit Judge, ARCHER, Senior Circuit Judge, and GAJARSA, Circuit Judge.

Opinion for the court filed by Senior Circuit Judge ARCHER. Dissenting opinion filed by Circuit Judge NEWMAN.

ARCHER, Senior Circuit Judge.

Elizabeth Bonner ("Mrs.Bonner") appeals the United States Court of Appeals for Veterans Claims' ("Veterans Court") affirmance of the Board of Veterans' Appeals' ("Board") determination that she was not entitled to an effective date earlier than November 1, 1994, for dependency and indemnity compensation ("DIC"). *Bonner v. Nicholson*, 19 Vet.App. 188 (2005). Because we conclude that the Veterans Court neither misinterpreted *Moody v. Principi*, 360 F.3d 1306 (Fed.Cir.2004), nor committed harmful error, we affirm the Veterans Court's judgment.

I.

Rear Admiral Emmett P. Bonner ("Admiral Bonner") died on August 1, 1975, following a distinguished career in the United States Navy. Shortly thereafter, his wife, Elizabeth Bonner, filed a claim for DIC with the Veterans Administration Regional Office ("RO") listing "cancer" as the cause of Admiral Bonner's death. The supporting evidence filed with this claim included an autopsy report from the National Naval Medical Center ("NNMC") listing Hodgkin's disease as cause of death and a death certificate listing Hodgkin's disease as the "immediate cause" of death. The RO determined the cause of death as Hodgkin's disease, a form of cancer, which had been diagnosed during Admiral Bonner's hospitalization from January to April 1975. The RO denied the claim for DIC because there was no evidence of service connection. The decision was not appealed and, therefore, became final.

Thereafter, 38 C.F.R. § 3.313 was issued in 1990 to address service connection for injuries caused by exposure to herbicides during military service in Vietnam. It provided, in pertinent part, that "[s]ervice in Vietnam during the Vietnam Era together with the development of non-Hodgkin's lymphoma ["NHL"] manifested subsequent to such service is sufficient to establish service connection for that disease." 38 C.F.R. § 3.313(b) (1990). This regulation was made retroactive to August 5, 1964. 55 Fed.Reg. 43,123 (Oct. 26, 1990).

The following year the Agent Orange Act of 1991 was enacted. This Act directed the Secretary, in certain circumstances, to establish presumptions of service connection for other diseases found to be associated with herbicide exposure while serving in the military. 38 U.S.C § 1116. Any presumption afforded by this statute was to be effective only prospectively from the date the final regulations were issued. 38 U.S.C. § 1116(c)(2). In 1994, pursuant to the Agent Orange Act, the VA added Hodgkin's disease to the list of diseases presumptively associated with exposure to herbicides in Vietnam. 59 Fed.Reg. 5106 (Feb. 3, 1994) (in relevant part amending 38 C.F.R. § 3.309 and 38 C.F.R. § 3.307).

In 1995, pursuant to a claim by Mrs. Bonner under the Radiation Exposure Compensation Act, Pub.L. No. 98-542, 98 Stat. 2725, tissue samples from Admiral Bonner were examined by the National Institutes of Health ("NIH"). The findings of this examination reported that "immunohistochemical studies favor the

diagnosis of nonHodgkin's lymphoma."[1] Based on this conclusion and, presumably, the above regulations promulgated in the 1990s, Mrs. Bonner submitted a letter to the VA stating that Admiral Bonner's death was likely related to NHL; that Admiral Bonner had been exposed to radiation during his military service; and that she was, therefore, entitled to DIC effective as of the date of her 1975 claim.

The RO treated this letter as a request to reopen Mrs. Bonner's previously denied claim on the basis of new and material evidence under 38 U.S.C. § 5108 (2000). The RO awarded Mrs. Bonner DIC effective November 1, 1995, the date of receipt by the VA of her letter, based on the non-appealed finding that Hodgkin's disease caused Admiral Bonner's death but applying the presumption of service connection for such disease under the Agent Orange Act. Mrs. Bonner filed a Notice of Disagreement contending that because she filed a claim for service connection for the cause of Admiral Bonner's death shortly after his death, the effective date for DIC should be the date on which he died, August 1, 1975. The RO subsequently issued a

---

[1] Contrary to the dissent's assertion, the 1995 NIH report reexamining Admiral Bonner's condition at the time of his death was ambiguous in that his illness "simulat[ed] Hodgkin's Disease" but also "favor[ed] a diagnosis of non-Hodgkin's lymphoma." This does not demonstrate that the 1975 diagnosis of Hodgkin's Disease as the cause of death was indisputably incorrect. After a detailed review of the 1995 NIH report, the RO concluded that the evidence was also consistent with Hodgkin's Disease. Regardless, as explained below, the cause of Admiral Bonner's death was not relevant to the decision of the Veterans Court.

statement of the case which granted an earlier effective date for DIC benefits of November 1, 1994, one year prior to the November 1, 1995 application to reopen the claim. This award was based upon the regulation that provides that if a claim is reviewed more than one year after the effective date of a change in the law, as was the case here, benefits may be authorized for a period of one year prior to the date of receipt of such request. *See* 38 C.F.R. § 3.114(a)(3).

Following several more exchanges between Mrs. Bonner and the VA, in August 1999, the RO issued a supplemental statement of the case noting Mrs. Bonner's assertion that NHL was the cause of Admiral Bonner's death. This supplemental statement of the case clarified the bases for the RO's determination that the cause of Admiral Bonner's death was Hodgkin's disease. Specifically, the RO stated that the 1995 NIH biopsy and medical records did not provide a definitive diagnosis of NHL. The RO noted that the presence of Reed-Sternberg cells and variants found in the 1995 biopsy was consistent with a diagnosis of Hodgkin's disease. The RO also indicated that the final diagnosis in the 1995 report of "malignant lymphoma, large cell, immunoblastic type, with necrosis involving the lymph nodes [and] liver," was similarly consistent with Hodgkin's lymphoma.

Mrs. Bonner appealed this decision to the Board. The Board first noted that in order for Mrs. Bonner to receive benefits under 38 C.F.R. § 3.313(a), the denial of her 1975 claim had to have been a denial of a claim for service connection for NHL, not a denial of service

connection for another disease. Based on this conclusion, the Board opined that it did not need to reach the issue of whether an effective date for an award of DIC based on Mrs. Bonner's 1975 claim would have been warranted if the RO had awarded DIC in 1995 based on a cause of death from NHL, as opposed to Hodgkin's disease. This was "because the denial of [Mrs. Bonner's] original claim in 1976 was a denial based on [a claim for] cause of death from Hodgkin's disease, not NHL." In other words, Mrs. Bonner was ineligible for retroactive benefits under § 3.313 because her 1975 claim was for Hodgkin's disease and not NHL.[2] Having made this determination, the Board explained that for the reasons posited by the RO, the earliest effective date Mrs. Bonner could receive was November 1, 1994.

Mrs. Bonner appealed the Board's decision to the Veterans Court. Affirming the Board's action, the Veterans Court concluded that "the evidence established that Mrs. Bonner's [1975] claim was one for Hodgkin's disease as the cause of her husband's death, and, therefore, we cannot conclude that the evidence reasonably raised any claims for the cause of death by types of cancer other than Hodgkin's disease." *Bonner*, 19 Vet.App. at 195. The Veterans Court also noted that the Board did not disturb the RO's finding that the evidence of record revealed Hodgkin's disease as the

[2] Under VAOPGCPREC 5-94 (a VA General Counsel Precedential Opinion) benefits under § 3.313 are awarded retroactive to "the date . . . of an original claim for that [NHL] benefit . . . if the claimant was otherwise eligible on the date of claim." (emphasis added). Thus, in order to receive benefits under § 3.313, the original claim must have been one for NHL.

cause of Admiral Bonner's death and therefore the cause-of-death finding remained Hodgkin's disease. The Veteran's Court then concluded that "the Board had a plausible basis to find that the cause of Mr. Bonner's death was Hodgkin's disease." *Id.* at 21.

Mrs. Bonner challenges the Veterans Court's determinations. We have jurisdiction pursuant to 38 U.S.C. § 7292.

II.

A.

We have limited jurisdiction to review a decision of the Veterans Court. We may review the validity of "a rule of law or of any statute or regulation . . . or any interpretation thereof . . . that was relied on by the [Veterans Court] in making the decision." 38 U.S.C. § 7292(a) (2000). Included within this review is whether the Veterans Court exceeded its jurisdiction, *Wanner v. Principi*, 370 F.3d 1124, 1128 (Fed.Cir.2004) (explaining that the "Veterans Court's compliance with its jurisdictional statute is a question of law, reviewed de novo" by this court), and whether the Veterans Court "misinterpreted our rulings in earlier decisions on an issue of law," *Moody v. Principi*, 360 F.3d 1306, 1310 (Fed.Cir.2004). We review de novo a claim that the Veterans Court committed legal error. *Id.* However, absent a constitutional issue, we lack jurisdiction to review factual findings of the Veterans Court or that court's application of law to fact. *Id.*

B.

Mrs. Bonner alleges two errors in the Veterans Court's decision. First, Mrs. Bonner asserts the Veterans Court misconstrued our decision in *Moody v. Principi* ("*Moody* ") when it did not read her 1975 claim for "cancer" as encompassing a claim for NHL. This position is grounded in the assertion that the clinical findings contained in the 1975 autopsy report also supported a determination that Admiral Bonner's death was caused by NHL. Second, Mrs. Bonner contends the Veterans Court exceeded its jurisdiction when it decided a factual issue, the cause of Admiral Bonner's death, that the Board did not reach in the first instance. Mrs. Bonner concedes that in order for her "to prevail ultimately in receiving DIC as of the date of her original claim, she will have to establish that her husband died of non-Hodgkin's lymphoma, and that her original claim was broad enough to encompass non-Hodgkin's lymphoma."

The government argues that we lack jurisdiction to review the factual determination that Hodgkin's disease was the cause of Admiral Bonner's death. It further argues that the Veterans Court correctly concluded that the Board did not err in holding that Mrs. Bonner was not entitled to a 1975 effective date for DIC benefits. Additionally, the government contends that Mrs. Bonner failed to demonstrate how the VA erred in developing her 1975 claim and that even if Mrs. Bonner were able to show that she had reasonably raised a claim for NHL in 1975 that has not yet been adjudicated, such an error is to be corrected

through a motion asserting the VA had committed clear and unmistakable error ("CUE").[3]

C.

In *Moody*, we reiterated that "with respect to all pro se pleadings," *id.* at 1310, the VA must give a sympathetic reading to the veteran's filings by "'determin[ing] all potential claims raised by the evidence, applying all relevant laws and regulations,'" *id.* (quoting *Roberson v. Principi*, 251 F.3d 1378 (Fed.Cir.2001)). We can find no indication that the Veterans Court misinterpreted this mandate. In fact, the Veterans Court expressly recited the legal standard quoted above. *Bonner*, 19 Vet.App. at 188. The Veterans Court examined the evidence of record and concluded:

> At the time of the 1976 RO adjudication, the evidence established that Mrs. Bonner's claim was one for Hodgkin's disease as the cause of her husband's death, and, therefore, we cannot conclude that the evidence reasonably raised any claims for the cause of death by types of cancer other than Hodgkin's disease. *Compare Moody, Szemraj, Roberson*.

Id. at 195.

---

[3] The only way the RO's unappealed 1976 decision can be collaterally attacked is through a claim of "clear and unmistakable error" ("CUE"). At oral argument, Mrs. Bonner conceded that a CUE claim was not at issue in this case. Therefore, the issue of the validity of the 1976 decision is not before us.

Mrs. Bonner does not explain how the Veterans Court purportedly misinterpreted *Moody.* In *Moody* we rejected the Veterans Court's suggestion that in order for pleadings to be read as containing a potential claim there must have been "evidence undebatably establish[ing]" the existence of such a claim. *Moody*, 360 F.3d at 1310. Mrs. Bonner does not argue that the Veterans Court required her to make a more stringent showing than that required by *Moody.* Nor does she contend that the Veterans Court improperly determined that the mandate of *Moody* did not apply here. In essence, Mrs. Bonner takes issue with the Veterans Court's application of *Moody.* That is, she disagrees with the Veterans Court's conclusion that a claim for NHL was not supported by the evidence before the RO in 1976. However, the interpretation of the 1975 claim "is essentially a factual inquiry, and it is beyond our jurisdiction to make that determination." *Moody*, 360 F.3d at 1310.[4]

Mrs. Bonner also contends that the Veterans Court exceeded its jurisdiction when it decided a factual issue—the cause of Admiral Bonner's death—that

---

[4] We note that when the VA fails to construe the veteran's pleadings to raise a claim, such an error is properly corrected through a CUE motion. *See Bingham v. Nicholson*, 421 F.3d 1346, 1349 (Fed.Cir.2005) (explaining that the VA's failure to consider all aspects of a claim is properly challenged through a CUE motion); *Andrews v. Nicholson*, 421 F.3d 1278, 1284 (Fed.Cir.2005) (stating "when the VA violates *Roberson* by failing to construe the veteran's pleadings to raise a claim, such claim is not considered unadjudicated but the error is instead properly corrected through a CUE motion"). CUE is not simply a "buzz word" as stated by the dissent. It is a statutorily created avenue for challenging a VA decision. *See* 38 U.S.C. § 5109A.

the Board did not reach. Under 38 U.S.C. § 7261(a), the Veterans Court's jurisdiction is limited to deciding issues that are "necessary to its decision and presented" to it. 38 U.S.C. § 7261(a)(4) (2000) (stating "[i]n any action brought under this chapter, the Court of Appeals for Veterans Claims, to the extent necessary to its decision and when presented, shall . . . in the case of a finding of material fact adverse to the claimant made in reaching a decision in a case before the Department with respect to benefits under laws administered by the Secretary, hold unlawful and set aside or reverse such finding if the finding is clearly erroneous"). The Board determined that Mrs. Bonner was not entitled to DIC prior to November 1, 1994, regardless of whether Admiral Bonner's death was caused by Hodgkin's disease or NHL.

The Veterans Court did not decide or rely on the cause of Admiral Bonner's death in affirming the Board's decision. Rather, it relied on the characterization of Mrs. Bonner's 1975 claim, evidenced by the supporting documentation, as one for death caused by Hodgkin's disease. The Veterans Court merely concluded that this information provided a plausible basis for the RO's determination that Hodgkin's disease was the cause of death. Furthermore, even if we were to conclude that the Veterans Court exceeded its jurisdiction by deciding a factual issue not "necessary" to its decision, any such error would be harmless, as the grounds for the Veterans Court's decision would remain in place. Accordingly, we need not decide if the

Veterans Court exceeded its jurisdiction in this instance.

III

The judgment of the Veterans Court is therefore

AFFIRMED.

NEWMAN, Circuit Judge, dissenting.

The Department of Veterans Affairs relied on a plainly incorrect autopsy diagnosis to deny Mrs. Bonner the Dependency and Indemnity Compensation benefits to which she is entitled. From the panel majority's denial of these benefits and refusal to correct the concededly incorrect cause of death, I respectfully dissent.

Admiral Emmett Peyton Bonner was a Naval officer who graduated from the United States Naval Academy in 1939. His naval career included service in World War II, Korea, and Vietnam. While in the service he was exposed to radiation during atmospheric nuclear testing in the South Pacific in 1958, and may have been exposed to Agent Orange in Vietnam. He retired at the age of 54 and died of cancer three years later.

Admiral Bonner's wife, the appellant, applied for Dependency and Indemnity Compensation, listing the cause of death as "cancer." An autopsy performed at

the time of death by the National Naval Medical Center (NNMC) listed the cause of death as Hodgkin's Disease. Mrs. Bonner's claim was initially denied as not being service connected, since neither Hodgkin's Disease nor other forms of lymphoma (Non-Hodgkin's Lymphoma or NHL) were presumptively service connected.

The National Institutes of Health subsequently reviewed the autopsy report and a group of slides that the government had preserved. The conclusion was that the original diagnosis of Hodgkin's Disease was incorrect, and that Admiral Bonner died of Non-Hodgkin's Lymphoma. It is not disputed that the second diagnosis is the correct one.

The panel majority, while asserting that the cause of death is a factual matter not open to our review, speculates about the meaning and accuracy of the two autopsy reports. Thus the court proposes that the 1975 diagnosis of Hodgkin's Disease as the cause of death may have been correct. The majority's preference for the 1975 diagnosis of Hodgkin's Disease is contrary to NIH's undisputed conclusion that the autopsy "favors" non-Hodgkin's lymphoma, and that the earlier diagnosis was incorrect. For example, the 1995 NIH report states that "although the infiltrate contains cells which resemble Reed-Sternberg cells and variants, the infiltrate lacks the usual inflammatory background of Hodgkin's disease. Immunohistochemical studies favor the diagnosis of non-Hodgkin's lymphoma." Reed-Sternberg cells, and the "usual inflammatory background" found to be absent, are mandatory elements of

Hodgkin's disease. *See* Ramzi S. Cotran, et al. *Robbins Pathologic Basis of Disease* 5th ed.2001, App. at 96-116. The NIH report concludes with the following paragraphs:

> The patient was a 57 year old white male diagnosed as lymphocyte-depleted Hodgkin's disease in January 1975 and treated with combined chemotherapy and radiation, who died 8/1/75. At autopsy he was found to have extensive nodal and hepatic involvement by lymphoma, initially interpreted as consistent with Hodgkin's disease. The major pathological question addressed to us was whether, in light of current concepts, the tumor would be reclassified as a non-Hodgkin's lymphoma.
>
> Microscopic examination of the lymph nodes and liver nodules show massive involvement by malignant lymphoid cells. The malignant cells are large, pleomorphic cells, with prominent nucleoli, some of which resemble Reed-Sternberg cells and variants. However, the background infiltrate is sparse and composed of small, mature lymphocytes. It lacks the normal mixed inflammatory background of Hodgkin's disease as well. The malignant cells are histologically identical in appearance to those seen in the biopsies of the abdominal mass (dated 2/6/75) and axillary lymph node (dated 4/3/75). Immunoperoxidase stains were performed on paraffin sections of the submitted surgical material and favor the diagnosis of non-Hodgkin's lymphoma. (See attached surgical pathology, report NIH # S95-5688)

> T-cell rich B-cell lymphomas simulating Hodgkin's disease have been well described, and represent a 4-5% misdiagnosis of Hodgkin's disease. Indeed, a review of originally classified lymphocyte-depleted Hodgkin's disease cases at the National Cancer Institute revealed 26% with a high-grade non-Hodgkin's lymphoma, the majority of those cases were further classified as diffuse, large cell, immunoblastic type lymphomas.

The NIH report concluded that Admiral Bonner died of non-Hodgkin's lymphoma, and the Board of Veterans Appeals agreed. *See Appeal of Elizabeth Bonner*, No. 96-35144 (BVA Sept. 27, 2001) at 3 (setting forth the finding of fact that "the RO received evidence from the National Institutes of Health (NIH) indicating that the diagnosis of Hodgkin's disease made in the veteran's case in 1975 was in error and that the veteran had actually died of non-Hodgkin's lymphoma (NHL)."') No contradiction to that finding is mentioned by the Board, or by the Veterans Court.

My concern is not that the Regional Office initially arrived at an incorrect cause of death based on an incorrect autopsy report. My concern is that the Board refused to change its ruling despite accepting the new and unchallenged information in the NIH autopsy report, leaving the plainly incorrect diagnosis unrepealed and thereby denying the widow her entitlement.

Nonetheless, the DVA has refused to correct the error in Admiral Bonner's records, thereby reducing the statutory benefits available to Mrs. Bonner. By

statutory enactment after the Viet Nam war, Congress established the presumption that deaths from both Hodgkin's Disease and Non-Hodgkin's Lymphoma are service connected, but placed different retroactive effects on these determinations. Thus a veteran who died of Non-Hodgkin's Lymphoma entitles his widow to compensation retroactive to 1964; that is, the claim benefits from the presumption of service connection, even if the claim had been denied before the statutory and regulatory provisions were enacted. However, compensation for Hodgkin's Disease is awarded only for the period after the law was enacted and only for a year before the claim is filed. (The difference appears to relate to Agent Orange exposure in Viet Nam). Thus, whether Admiral Bonner died of Hodgkin's Disease or Non-Hodgkin's Lymphoma determines whether Mrs. Bonner receives compensation from 1994 or from 1975.

Mrs. Bonner filed another request for compensation in 1995, requesting compensation from the filing of her original claim in 1975. The VA, applying the rules for Hodgkin's Disease based on the original autopsy, awarded compensation from 1994. The Regional Office refused to change the diagnosis despite the corrected autopsy report. The Board of Veterans Appeals remarked that the two autopsies reached different conclusions, but held that since the claim as originally filed was for Hodgkin's Disease, Mrs. Bonner could not receive the retroactive benefit of the Non-Hodgkin's statute and regulations. On appeal, the Court of Appeals for Veterans Claims ruled that the cause of death was Hodgkin's Disease since the Regional Office had

made that determination and the BVA had not disturbed it.

The claim as initially filed by Mrs. Bonner named "cancer" as the cause of death. It is not disputed that both Hodgkin's Disease and Non-Hodgkin's Lymphoma are forms of cancer. However, the Veterans Court affirmed the BVA ruling that the initial claim for "cancer" was really a claim based on Hodgkin's Disease because the evidence initially presented to the Regional Office stated that diagnosis. The Veterans Court refused to consider the second autopsy report.

Neither Mrs. Bonner nor the VA can be charged with prior knowledge that the original autopsy report was incorrect. The proper procedure is to correct the veteran's records in accordance with the correct autopsy report. It is not an unreviewable factual question of whether the VA is required to recognize an undisputed error in the veteran's records, and to apply the correct cause of death to survivors' claims. Upon such recognition, Mrs. Bonner's claim would be subject to determination on the correct grounds, whether or not she used the buzz-words "clear and unmistakable error (CUE)" in her petition (as the government argues). The obligatory veteran-friendly position of the law governing veterans' claims negates this hyper-technical reason whereby the Veterans Court refused to consider the merits of Mrs. Bonner's claim. From my colleagues' acceptance of this reasoning, I respectfully dissent.

Elizabeth H. BONNER, Appellant,
v.
R. James NICHOLSON,
Secretary of Veterans Affairs, Appellee.

No. 02-742.

United States Court of Appeals
for Veterans Claims.

Argued March 15, 2005.

Decided June 17, 2005.

Mark H. Bonner, of Great Falls, Virginia, for the appellant.

Christine M. Cote, with whom Tim S. McClain, General Counsel; R. Randall Campbell, Assistant General Counsel; and Michael A. Leonard, Deputy Assistant General Counsel, all of Washington, D.C., were on the brief for the appellee.

Before IVERS, Chief Judge, and GREENE, and HAGEL, Judges.

GREEN, Judge, filed the opinion of the court. HAGEL, Judge, filed a concurring opinion.

GREENE, Judge:

Mrs. Elizabeth H. Bonner, widow of veteran Emmet P. Bonner, appeals, through counsel, a September 27, 2001, Board of Veterans' Appeals (Board) decision that denied an effective date earlier than November 1994 for an award of dependency and indemnity compensation (DIC). Record (R.) at 1–35. Mrs. Bonner

argues that under 38 U.S.C. § 5110(g), 38 C.F.R. § 3.313 (2004), and VA Office of General Counsel opinions she is entitled to an effective date of August 1975 for her DIC benefits. Appellant's Brief (Br.) at 4–10. She further maintains that the Board erred by ruling that her original service-connection claim in 1975 did not include a claim for non-Hodgkin's lymphoma. *Id.* The Secretary contends that the Board decision should be affirmed in that the Board had a plausible basis in the record for denying an effective date earlier than November 1, 1994. He also asserts that the Board's decision was supported by an adequate statement of reasons or bases. Secretary's Br. at 6–12. For the reasons that follow, the Board decision will be affirmed.

I. FACTS

Veteran Emmett P. Bonner served honorably in the U.S. Navy from June 1939 to April 1972, including service in World War II, the Korean Conflict, and Vietnam. R. at 38. In September 1972, he was awarded VA service connection for a hernia and hearing loss. R. at 189–90, 292. Mr. Bonner died on August 1, 1975. R. at 281. In September 1975, Mrs. Bonner filed an application for DIC and claimed that her husband died from cancer. R. at 276–79. Mr. Bonner's death certificate listed Hodgkin's disease as the cause of his death. R. at 281. An autopsy report from the National Naval Medical Center also noted that Mr. Bonner's death was caused by an "undifferentiated tumor, which was felt to be most consistent with Hodgkin's disease." R. at 288–89. A VA regional office (RO) denied her claim in

February 1976 after finding that Mr. Bonner's Hodgkin's disease developed in January 1975, three years after his retirement from the Navy, and that in his service medical records there was no evidence of his having symptoms of that condition while in service. R. at 292. She did not appeal that decision. *See* R. at 1–744.

In October 1990, the Secretary promulgated VA regulation 38 C.F.R. § 3.313 (1991), which provided, as it does now, "[s]ervice in Vietnam during the Vietnam Era together with the development of non-Hodgkin's lymphoma manifested subsequent to such service is sufficient to establish service connection for that disease." 38 C.F.R. § 3.313(b). The effective date for this provision was August 5, 1964, the beginning date of the Vietnam era. *See McCay v. Brown*, 9 Vet.App. 183, 188 (1996); *see also* 55 Fed.Reg. 43,123 (Oct. 26, 1990). In February 1994, the VA General Counsel formally opined:

> An effective date for service connection of *non-Hodgkin's lymphoma* under 38 C.F.R. § 3.313 may generally be based on the date of receipt by the Department of Veterans Affairs of an original claim *for that benefit* filed on or after August 5, 1964, regardless of whether the claim had previously been denied, *if the claimant was otherwise eligible on the date of claim.*

VA Gen. Coun. Prec. 5–1994 (Feb. 18, 1994) [hereinafter G.C. Prec. 5–1994] (emphasis added). Also in February 1994, VA issued a regulation that stated, as it does now: "If a veteran was exposed to an herbicide agent during active military, naval, or air service, the

following diseases shall be service-connected . . . even though there is no record of such disease during service." 38 C.F.R. § 3.309(e) (1994). Hodgkin's disease and non-Hodgkin's lymphoma were listed as diseases presumed service connected under this regulation. *Id.* The effective date of that liberalizing regulation was February 3, 1994. 38 C.F.R. § 3.309(e); 59 Fed.Reg. 5106 (Feb. 3, 1994).

In November 1995, Mrs. Bonner informed the RO that a National Institutes of Health (NIH) oncologist had reviewed tissue samples and slides from Mr. Bonner's autopsy and had reviewed Mr. Bonner's service medical records. R. at 309. The oncologist diagnosed Mr. Bonner's tumor as "simulating Hodgkin's disease." R. at 302. The examiner also noted that "Immunohistochemical studies favor[ed] the diagnosis of non-Hodgkin's lymphoma." R. at 303. Mrs. Bonner asserted to the RO that, based upon this evidence, the earlier denial of her DIC claim was erroneous and that under 38 C.F.R. § 3.313, she was entitled to DIC effective in 1975, the year that she originally filed her DIC claim. *Id.* The RO considered the medical evidence and the February 1994 change in the law regarding presumptions of service connection for Hodgkin's disease and non-Hodgkin's lymphoma, and in a November 1995 decision stated:

> The veteran's death certificate showed the primary cause of death as Hodgkin's disease. No other conditions were shown as contributing to the cause of death. The letter from [Mrs. Bonner] indicated that the diagnosis of Hodgkin's disease by

> the National Naval Medical Center in Bethesda, [Maryland,] was in error. Mrs. Bonner indicated that a further study by the [NIH] indicated that in fact the disease was non-Hodgkin's lymphoma. The veteran served in the Republic of Vietnam during the Vietnam era, [and] is presumed to have been exposed to a herbicide containing dioxin (Agent Orange) while in Vietnam. Both Hodgkin's disease and non-Hodgkin's lymphoma may be caused by exposure to a herbicide containing dioxin. Therefore, service connection for cause of death is established.

R. at 312. The RO construed Mrs. Bonner's inquiries on this matter as an informal claim for review and found that the evidence showed Hodgkin's disease was the cause of Mr. Bonner's death. R. at 312–13. Mrs. Bonner was awarded DIC effective November 1995, the date of her informal claim for review. *Id.* Mrs. Bonner disagreed with the effective date, and, in a July 1996 Statement of the Case (SOC), the RO, under 38 C.F.R. § 3.114 (1995) (if a claim is reviewed at the request of the claimant more than one year after the effective date of the law or VA issue, benefits may be authorized for a period of one year prior to the date of receipt of such request), assigned an earlier effective date of November 1994. R. at 318–22. The RO ruled that Mrs. Bonner's reopened claim was filed more than a year after the liberalizing law authorizing a presumption of service connection for Hodgkin's disease based on herbicide exposure was promulgated, and that, therefore, under 38 C.F.R. § 3.114(a)(3) she was entitled to

an effective date one year prior to the date of her request for review. *See* R. at 320–22.

Mrs. Bonner appealed to the Board and argued that she should have received an effective date of August 1, 1975. R. at 324–39. The Board found:

> [B]ecause the RO construed the appellant's November 1995 claim as a request to conduct a *de novo* or new review of her original claim for DIC based on the same facts, i.e., cause of death from Hodgkin's disease, under liberalizing provisions[,] which now provided a presumption of service connection for Hodgkin's disease and thereby created a new cause of action, the RO was able to grant an earlier effective date of November 1, 1994, under the exception to the general rule governing the assignment of effective dates for awards based on liberalizing laws. . . . Therefore, the RO construed the appellant's claim in the way most beneficial to her because it permitted her to receive payment of DIC for a year prior to receipt of the November 1995 claim.

R. at 32–33. The Board also concluded that an effective date earlier than November 1, 1994, would not have been assigned had the RO determined that non-Hodgkin's lymphoma had caused Mr. Bonner's death. R. at 30–31. The Board stated:

> [E]ven assuming, without deciding, that the appellant's reading of [G.C. Prec. 5–1994] as providing "benefits under [§] 3.313(b) retroactively effective to the date of the original claim, regardless of whether the claim had been previously denied," is correct, the Board concludes that the previous

> denial in such a case must have been a denial of a claim for service connection of [non-Hodgkin's lymphoma], not a denial of service connection for another disease. Thus, the Board need not reach the issue of whether an effective date for an award of DIC based on the date of the appellant's original claim would have been warranted in this case had the RO awarded DIC in 1995 based on cause of death from [non-Hodgkin's lymphoma] under 38 C.F.R. § 3.313 because the denial of appellant's original claim in 1976 was a denial based on cause of death from Hodgkin's disease, not [non-Hodgkin's lymphoma].
>
> Concerning this, the Board notes that, by submitting evidence in 1995 to show that, based on a study done by experts at NIH in June 1995, the cause of the veteran's death was actually [non-Hodgkin's lymphoma] and not Hodgkin's disease, the appellant was not requesting that the VA review her original claim under liberalizing laws enacted since the 1976 denial, but rather she was requesting that the VA reopen her original claim on a new factual basis-a factual basis other than the one on which the claim was considered in 1976. The latter is not a request for "review" of the same claim, i.e., the same *facts*, under a new law or new theory of legal entitlement but rather a request to reopen the original claim on a new factual basis as shown by new and material evidence submitted in 1995.

Id. This appeal followed.

II. CONTENTIONS ON APPEAL

Mrs. Bonner argues that, under 38 U.S.C. § 5110(g), 38 C.F.R. § 3.313, and VA General Counsel opinions interpreting these provisions, she is entitled to a September 1975 effective date for her DIC. Appellant's Br. at 4–10. She maintains that her original claim for "cancer" in September 1975 (R. at 276–79) encompassed, under 38 C.F.R. § 3.313(b), a claim for non-Hodgkin's lymphoma. *Id.* Alternatively she contends that her DIC award based on Hodgkin's disease as the cause of her husband's death entitles her to an earlier effective date under *Nehmer v. U.S. Dep't of Veterans Affairs*, 32 F.Supp.2d 1175 (N.D.Cal.1999) [hereinafter *Nehmer II*]. *Id.* at 10. Finally, at oral argument before the Court, Mrs. Bonner asserted that in the interest of fairness and equity she should be awarded an effective date of 1975.

The Secretary asserts that there was a plausible basis in the record for the Board's determination that November 1, 1994, was the proper effective date for Mrs. Bonner's DIC. Secretary's Br. at 4, 6–12. He further maintains that the Board decision was supported by an adequate statement of reasons or bases. *Id.*

III. ANALYSIS

Generally, "the effective date of an award based on an original claim, a claim reopened after final adjudication, or a claim for increase, of compensation, [DIC], or pension, shall be fixed in accordance with the facts found, but shall not be earlier than the date of receipt

of application therefor." 38 U.S.C. § 5110(a); *see* 38 C.F.R. § 3.400 (2004). The effective date of a reopened claim is either the date of application to reopen or is established in accordance with the facts found, whichever is later. *See Link v. West*, 12 Vet.App. 39, 46 (1998). Under 38 C.F.R. § 3.313(b), "[s]ervice in Vietnam during the Vietnam Era together with the development of non-Hodgkin's lymphoma manifested subsequent to such service is sufficient to establish service connection for that disease." The effective date for this provision is August 5, 1964, the beginning date of the Vietnam era. *See McCay*, 9 Vet.App. at 188; *see also* 55 Fed.Reg. 43,123 (Oct. 26, 1990). Additionally, VA regulation § 3.114(a) provides:

> (a) Effective date of award. Where pension, compensation, [or DIC], . . . is awarded or increased pursuant to a liberalizing law, or a liberalizing VA issue approved by the Secretary or by the Secretary's direction, the effective date of such award or increase shall be fixed in accordance with the facts found, but shall not be earlier than the effective date of the act or administrative issue. Where pension, compensation, [or DIC], . . . is awarded or increased pursuant to a liberalizing law or VA issue which became effective on or after the date of its enactment or issuance, in order for a claimant to be eligible for retroactive payment under the provisions of this paragraph the evidence must show that the claimant met all eligibility criteria for the liberalized benefit on the effective date of the liberalizing law or VA issue and that such eligibility existed continuously from

> that date to the date of claim or administrative determination of entitlement.
>
> (1) If a claim is reviewed on the initiative of VA within 1 year from the effective date of the law or VA issue, or at the request of a claimant received within 1 year from that date, benefits may be authorized from the effective date of the law or VA issue.
>
> (2) If a claim is reviewed on the initiative of VA more than 1 year after the effective date of the law or VA issue, benefits may be authorized for a period of 1 year prior to the date of administrative determination of entitlement.
>
> (3) If a claim is reviewed at the request of the claimant more than 1 year after the effective date of the law or VA issue, benefits may be authorized for a period of 1 year prior to the date of receipt of such request.

38 C.F.R. § 3.114(a)(1), (a)(2), (a)(3) (2004).

The Board's determination of an earlier effective date is reviewed under the "clearly erroneous" standard of review set forth in 38 U.S.C. § 7261(a)(4). *See Hanson v. Brown*, 9 Vet.App. 29, 32 (1996). "'A 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.'" *Brown v. Brown*, 4 Vet.App. 307, 309 (1993); *see also Harder v. Brown*, 5 Vet.App. 183, 189 (1993); *Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990) (emphasis added) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395, 68

S.Ct. 525, 92 L.Ed. 746 (1948)). Of course, if the Board's "'account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it.'" *Gilbert*, 1 Vet.App. at 52 (quoting *Anderson v. City of Bessemer City*, 470 U.S. 564, 573–74, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985)). In general, the effective date for an award of benefits will be based on the date of the claim that resulted in that award. *See Williams v. Principi*, 15 Vet.App. 189, 195 (2001) (en banc), *aff'd*, 310 F.3d 1374 (Fed.Cir.2002); *Lalonde v. West*, 12 Vet.App. 377, 380 (1999).

The Board must provide an adequate statement of the reasons or bases for its decision. *Gilbert*, 1 Vet.App. at 56–57. An adequate statement of reasons or bases must analyze the credibility and probative value of the evidence, account for the evidence that it finds persuasive or unpersuasive, and provide reasons for its rejection of any material evidence favorable to the veteran. *See* 38 U.S.C. § 7104(d)(1); *Gabrielson v. Brown*, 7 Vet.App. 36, 39–40 (1994); *Gilbert*, 1 Vet.App. at 56–57.

A. Effective Date for Hodgkin's Disease

The Board found that under § 3.114, the earliest possible effective date for Mrs. Bonner's claim was November 1, 1994. It is uncontested that Mrs. Bonner did not appeal the 1976 RO decision that denied DIC. *See* Appellant's Br. 1–11; *see also* R. at 1–744. Therefore, that decision became final. *See* 38 U.S.C. § 7105(c); *see also Person v. Brown*, 5 Vet.App. 449, 450 (1993) (failure to file timely appeal of RO decision within one-year

period renders decision final). Also, there is no dispute that Mrs. Bonner sent to the RO a letter in November 1995 (R. at 309) that the RO construed as an informal claim for review of her previously denied DIC claim (R. at 312–13). The RO and the Board reviewed Mrs. Bonner's DIC claim and, under the liberalizing law in 38 C.F.R. § 3.309(e) (presumption of service connection for Hodgkin's disease), which was promulgated in February 1994, awarded her DIC. R. at 312–13. As stated above, 38 C.F.R. § 3.114(a)(3) provides that, "[i]f a claim is reviewed at the request of the claimant more than 1 year after the effective date of the law or VA issue, benefits may be authorized for a period of 1 year prior to the date of receipt of such request." *See McCay*, 9 Vet.App. at 188. Mrs. Bonner did not file her informal claim until more than one year after the liberalizing law that was enacted in February 1994, and, thus, the earliest possible effective date available to her for her DIC claim is November 1, 1994, the date awarded. Accordingly, viewing the record in its entirety, the Board had a plausible basis for its decision in this regard, and that decision thus is not clearly erroneous. Further, that decision is supported by an adequate statement of the reasons or bases. *See Hanson* and *Gilbert*, both *supra*.

Mrs. Bonner's argument that under *Nehmer II* she is entitled to an effective date before November 1, 1994, is unavailing. In May 1989, the United States District Court for the Northern District of California (District Court) "voided all benefit decisions made under [38 C.F.R. § 3.311a(d) (1986)]," *Nehmer v. United*

States Veterans' Admin., 712 F.Supp. 1404, 1409 (N.D.Cal.1989) [hereinafter *Nehmer I*], and thereafter held in *Nehmer II* that *Nehmer I* had "voided those decisions in which the disease or cause of death is later found[,] under valid Agent Orange regulation(s)[,] to be service connected," *Nehmer II*, 32 F.Supp.2d at 1183. The Agent Orange regulation at issue in the *Nehmer* proceedings, 38 C.F.R. § 3.311a, became effective on September 25, 1985. *See* 50 Fed.Reg. 34, 458 (Aug. 26, 1985). In *Williams v. Principi*, this Court held that a claimant was not entitled to an earlier effective date based upon her 1979 and 1985 claims because it was clear from *Nehmer I* and *Nehmer II* that the only claims voided were those that were denied between September 1985 and May 1989, the period when the invalidated regulation (38 C.F.R. § 3.311a(d)) was in effect. *Williams*, 15 Vet.App. at 195–97. In this case, Mrs. Bonner filed her original claim in 1975, 10 years before the promulgation of the regulation at issue in *Nehmer* was invalidated. Thus, *Nehmer I* and *Nehmer II* would not be applicable to Mrs. Bonner's claim, and she is therefore, not entitled to an effective date earlier than November 1, 1994, based upon the holdings in those cases. *See Williams, supra.*

B. Effective Date for non-Hodgkin's lymphoma

Mrs. Bonner further argues that, because she asserted that her husband died from "cancer" in her 1975 DIC claim, that claim necessarily included a claim for non-Hodgkin's lymphoma and that under 38 C.F.R. § 3.313 she is eligible for an earlier effective date. The

United States Court of Appeals for the Federal Circuit and this Court have held that VA has a duty to develop fully and sympathetically a veteran's claim to its optimum and that VA is required to determine all potential claims raised by the evidence, applying all relevant laws and regulations. *Moody v. Principi*, 360 F.3d 1306 (Fed.Cir.2004); *Szemraj v. Principi*, 357 F.3d 1370 (Fed.Cir.2004); *Bingham v. Principi*, 18 Vet.App. 470 (2004); *see also Roberson v. Principi*, 251 F.3d 1378 (Fed.Cir.2001). Where such a review "reasonably reveals that the claimant is seeking a particular benefit, the Board is required to adjudicate the issue of the claimant's entitlement to such a benefit or, if appropriate, to remand the issue to the RO for development and adjudication of the issue." *Suttmann v. Brown*, 5 Vet.App. 127, 132 (1993). When discussing the evidence needed to identify and support a claim or application for benefits, the Court, in *Robinette v. Brown*, held:

> That "evidence" means more than just information to be filled in on the application form, and that an application includes the form *plus evidence in support of the claim* flows not only from the plain meaning of the term but also from the VA Adjudication Procedure Manual, M21–1.

Robinette, 8 Vet.App. 69, 78 (1995) (emphasis added).

Mrs. Bonner listed "cancer" on her original DIC application as the cause of Mr. Bonner's death (R. at 276–79), and submitted a copy of his death certificate that expressly listed his cause of death as "Hodgkin's disease" (R. at 281). Mrs. Bonner also provided to the

RO an autopsy report that stated: "A biopsy of [the abdominal mass] revealed an undifferentiated tumor, which was felt to be most consistent with Hodgkin's disease." R. at 289. Mrs. Bonner does not argue that Hodgkin's disease and non-Hodgkin's lymphoma are the same condition, and her assertion that the generic label of "cancer" necessarily included non-Hodgkin's lymphoma as a potential cause of her husband's death is not supported by the evidence of record. *See* R. at 281, 288–89, 292. At the time of the 1976 RO adjudication, the evidence established that Mrs. Bonner's claim was one for Hodgkin's disease as the cause of her husband's death, and, therefore, we cannot conclude that the evidence reasonably raised any claims for the cause of death by types of cancer other than Hodgkin's disease. *Compare Moody, Szemraj, Roberson*, and *Suttmann*, all *supra.* Because it was reasonable for the RO to rely on the then-competent medical evidence of record to identify the claim as one for Hodgkin's disease as the cause of death, the Board did not err by concluding that the denial of her claim in 1976 was based solely on the evidence that Hodgkin's disease caused Mr. Bonner's death. Thus, the 2001 Board correctly determined that Mrs. Bonner was not entitled to an effective date in 1975 under the interpretation of § 3.313 provided in G.C. Prec. 5–1994 because the previous denial of her claim must have been for a claim for service connection for non-Hodgkin's lymphoma, not for another disease.

Mrs. Bonner's evidence of non-Hodgkin's lymphoma as the cause of her husband's death was offered

to the RO on November 1, 1995. Because the 1976 RO decision denying her claim was not appealed and had become final, the RO in 1995 treated that evidence as new and material evidence to reopen her claim. Thereafter, the RO again determined that the evidence of record revealed Hodgkin's disease as the cause of Mr. Bonner's death. R. at 312–13. The Board did not disturb the RO's finding as to the cause of Mr. Bonner's death (*See* R. at 1–35), and, consequently, the cause-of-death finding remained Hodgkin's disease. The Court reviews such findings under the "clearly erroneous" standard of review. *See Brown, Harder*, and *Gilbert*, all *supra.* A review of the record in its entirety reveals that the Board had a plausible basis to find that the cause of Mr. Bonner's death was Hodgkin's disease. *Id.* Thus, that finding is not clearly erroneous. *Id.*

The Board also considered the possibility of non-Hodgkin's lymphoma as the actual cause of Mr. Bonner's death, but found that any such claim would be a claim to reopen Mrs. Bonner's original claim on a new factual basis as shown by new and material evidence submitted in 1995. R. at 16–18, 23–33. The Board concluded that even if she had prevailed on that claim, Mrs. Bonner still would not be entitled to an effective date earlier than November 1, 1994. *Id.* Under 38 U.S.C. § 5110(a), "the effective date of an award based on an original claim [or] a claim reopened after final disallowance . . . shall be fixed in accordance with the facts found, but *shall not be earlier than the date of receipt of application therefor.*" *See also* 38 C.F.R. § 3.400 (emphasis added). Because Mrs. Bonner presented

new and material evidence to VA concerning a potential change in diagnosis of the cause of her husband's death, that claim must necessarily be considered a reopening, based on new and material evidence, of her previously denied claim. Accordingly, the effective date of any award based upon non-Hodgkin's lymphoma cannot be earlier than the date of receipt of that application or claim, here, November 1, 1995, and the Board did not err in so holding. *Perry v. West*, 12 Vet.App. 365 (1999).

C. Equitable Relief

Mrs. Bonner's plea for equitable relief in this matter is not unnoticed. This Court, however, may not award equitable relief, no matter how compelling the facts. *See Moffitt v. Brown*, 10 Vet.App. 214, 225 (1997). On the other hand, the Secretary, in appropriate cases, has that authority. *See* 38 U.S.C. § 503(a); *Zimick v. West*, 11 Vet.App. 45, 50–51 (1998) (explaining that Secretary's authority to grant equitable relief under section 503 is wholly within Secretary's discretion and Court lacks jurisdiction to review exercise of Secretary's equity discretion); 38 C.F.R. § 2.7 (2004). Specifically, section 503 provides:

> If the Secretary determines that benefits administered by the Department have not been provided by reason of administrative error on the part of the Federal Government or any of its employees, the Secretary may provide such relief on account of such error as the Secretary determines equitable, including the payment of moneys to any person

> whom the Secretary determines is equitably entitled to such moneys.

38 U.S.C. § 503(a). Therefore, Mrs. Bonner may wish to petition the Secretary for relief under section 503(a), and the Secretary will certainly give it every consideration. *See Zimick, supra.*

IV. CONCLUSION

Upon consideration of the foregoing, the September 27, 2001, decision of the Board is AFFIRMED.

HAGEL, Judge, concurring:

Although I concur in the result of this opinion, I respectfully disagree with the reasoning employed by the majority in part III.B regarding Mrs. Bonner's claim for service connection for non-Hodgkin's lymphoma under 38 C.F.R. § 3.313. In my view, the Court need not reach the issue of whether Mrs. Bonner's claim for "cancer" in her 1975 DIC application included a claim for non-Hodgkin's lymphoma because in order to prevail on her claim for an earlier effective date for DIC pursuant to § 3.313 the evidence must be at least in equipoise in support of her position that her husband died of non-Hodgkin's lymphoma, and the Court correctly determined, albeit without detailed explanation, that the VA finding that he died of Hodgkin's disease is not "clearly erroneous." *Ante* at 195; *see* 38 U.S.C. § 5107(b).

As set forth in the opinion above, the VA finding regarding the cause of death is a question of fact, which the Court cannot overturn absent a determination that it is clearly erroneous. *Ante* at 195; 38 U.S.C. § 7261(a)(4); *see Turner v. Brown*, 6 Vet.App. 256, 258 (1994). In 1976, VA concluded that Mr. Bonner's cause of death was Hodgkin's disease. R. at 292. The regional office readjudicated the claim in 1995 but did not alter its finding regarding the cause of death, and the Board did not disturb the regional office's finding. R. at 1–35, 312–313. Although the majority does not address the evidence of record presented by Mrs. Bonner that her husband died of non-Hodgkin's lymphoma, I believe that the record contains some evidence that Mr. Bonner died as a result of non-Hodgkin's lymphoma but that it also contains evidence that he died from Hodgkin's disease. The Naval Medical Center's 1975 autopsy report states that Mr. Bonner had an "abdominal mass" that was most consistent with Hodgkin's disease lymphocyte depletion type. R. at 274. But that report also notes that "this is a rare type of Hodgkins" making up only 2% of all cases, and it is found in patients "frequently present with fever and night sweats, and rarely present with a mass." *Id.* In the June 19, 1995, National Institutes of Health report, an oncologist concludes that "[i]mmunohistochemical studies favor the diagnosis of non-Hodgkin's lymphoma" but also notes that Mr. Bonner's tumor contained cells which "simulat [ed] Hodgkin's disease." R. at 302–03. Both of these diagnoses are couched in terms of likelihood and probability. Because the National Institutes of Health report notes that Mr. Bonner's tumor simulated

Hodgkin's disease and only "favors" the diagnosis of non-Hodgkin's lymphoma, it was not clearly erroneous for VA to find that this evidence is not in equipoise with the Naval Medical Center diagnosis of Hodgkin's disease. 38 U.S.C. § 5107(b).

Because the Board did not disturb the VA finding that Mr. Bonner died of Hodgkin's disease and because this Court has not overturned that determination, Mrs. Bonner's argument for an earlier effective date for DIC under 38 C.F.R. § 3.313 is unavailing. Given that the evidence of record does not establish that Mr. Bonner died from non-Hodgkin's lymphoma, the issue of the breadth of Mrs. Bonner's initial claim for benefits is not, in my view, properly before us at this time. Consequently, I believe that it was unnecessary for the majority in part III.B to reach the question of whether a previously denied application for service connection for "cancer" may include a claim for non-Hodgkin's lymphoma pursuant to G.C. Prec. 5–1994 and § 3.313. *Ante* at 193–95.

Form approved.
Budget Bureau No. 76-R0010

VETERANS ADMINISTRATION

APPLICATION FOR DEPENDENCY AND INDEMNITY COMPENSATION OR DEATH PENSION BY WIDOW OR CHILD

(INCLUDING ACCRUED BENEFITS AND DEATH COMPENSATION, WHERE APPLICABLE)

IMPORTANT—Read instructions before filling in form. Answer all items fully. Detach and retain ONLY the instruction sheet. If more space is required, attach additional sheets and identify each answer by item number.

(DO NOT WRITE IN THESE SPACES)
VA DATE STAMP
SEP 3 1975
MAIL ROOM D.C.
WASH. R.O.

1. LAST NAME - FIRST NAME - MIDDLE NAME OF DECEASED VETERAN (Type or print)
BONNER, Emmett Peyton

2A. FIRST NAME - MIDDLE NAME - LAST NAME OF CLAIMANT (Type or print)
Elizabeth H. Bonner

2B. TELEPHONE NO.
301/652-3010

2C. MAILING ADDRESS OF CLAIMANT (Number and street or rural route, city or P.O., State and ZIP Code)
5210 Dorset Avenue
Chevy Chase, Maryland 20015

2D. RELATIONSHIP TO VETERAN (Check one)
[X] WIDOW [ ] CHILD

3. IF VETERAN PREVIOUSLY APPLIED TO THE VETERANS ADMINISTRATION FOR ANY BENEFIT, INSERT CLAIM NUMBER, IF KNOWN
C- unk

4. SOCIAL SECURITY NUMBER OF VETERAN
224-52-3707

5. RAILROAD RETIREMENT NO.
n/a

6. VETERANS ADMINISTRATION CLAIM NO.
XC-

PART I - IDENTIFICATION AND SERVICE INFORMATION OF VETERAN (See Instructions - paragraphs F & G)

7. DATE OF BIRTH	8. PLACE OF BIRTH	9. DATE OF DEATH	10. PLACE OF DEATH
2/27/18	Macon, GEORGIA	8/1/75	Bethesda, Maryland

10A. CAUSE OF DEATH (See Instructions, paragraph F)
CANCER

11. ARE YOU CLAIMING THAT THE CAUSE OF DEATH WAS DUE TO SERVICE?
[X] YES [ ] NO

12A. ENTERED ACTIVE SERVICE DATE	12A. PLACE	12B. SERVICE NO.	12C. SEPARATED FROM ACTIVE SERVICE DATE	12C. PLACE	12D. GRADE, RANK OR RATING, ORGANIZATION AND BRANCH OF SERVICE
6/1/39	Naval Academy	82744	5/1/72	Wash. D.C.	RADM, USN, Ret.

13. IF VETERAN SERVED UNDER A NAME OTHER THAN THAT SHOWN IN ITEM 1, GIVE FULL NAME AND SERVICE RENDERED UNDER THAT NAME
n/a

PART II - INFORMATION RELATING TO MARRIAGE (See Instructions, paragraph H)

INFORMATION RELATING TO VETERAN

14. HOW MANY TIMES WAS VETERAN MARRIED?
once

15A. MARRIAGE DATE	15A. PLACE	15B. TO WHOM MARRIED	15C. HOW MARRIAGE ENDED (Death, divorce, etc.)	15D. MARRIAGE ENDED DATE	15D. PLACE
2 Sept. '42	St. Patricks Cathedral New York City	Elizabeth HEATY	death	8/1/75	Maryland

INFORMATION RELATING TO WIDOW OR MOTHER OF THE CHILDREN FOR WHOM THIS CLAIM IS BEING MADE

16. HOW MANY TIMES HAS WIDOW BEEN MARRIED?	17. HAS WIDOW REMARRIED SINCE DEATH OF VETERAN?	18. DATE REMARRIED	19. PLACE REMARRIED
once	[ ] YES [X] NO (If "Yes," complete Item 18 and 19)	n/a	n/a

20A. MARRIAGE DATE	20A. PLACE	20B. TO WHOM MARRIED	20C. HOW MARRIAGE ENDED (Death, divorce, etc.)	20D. MARRIAGE ENDED DATE	20D. PLACE
2 Sept. '42	St. Patrick's Cathedral New York City	Emmett Peyton Bonner	death	8/1/75	Maryland

VA FORM 21-534 JAN 1974 SUPERSEDES VA FORM 21-534, NOV 1972, WHICH WILL NOT BE USED.

17

App. 94