

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

NOTE: This disposition is nonprecedential.

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

FAITH M. HIBBARD,
Claimant-Appellant

v.

**DENIS MCDONOUGH, SECRETARY OF
VETERANS AFFAIRS,**
Respondent-Appellee

2021-1720

Appeal from the United States Court of Appeals for
Veterans Claims in No. 20-80, Judge Michael P. Allen.

Decided: December 10, 2021

FAITH M. HIBBARD, Foley, AL, pro se.

IGOR HELMAN, Commercial Litigation Branch, Civil Di-
vision, United States Department of Justice, Washington,
DC, for respondent-appellee. Also represented by BRIAN M.
BOYNTON, ERIC P. BRUSKIN, MARTIN F. HOCKEY, JR.

Before TARANTO, BRYSON, and STOLL, *Circuit Judges*.

PER CURIAM.

Faith M. Hibbard sought enhanced dependency and indemnity compensation under 38 U.S.C. § 1311(a)(2) after the death of her husband, Ronald Hibbard, a veteran. The relevant regional office of the Department of Veterans Affairs (VA) denied her claim, and the Board of Veterans' Appeals affirmed. Ms. Hibbard appealed the Board's decision to the Court of Appeals for Veterans Claims (Veterans Court), which affirmed the denial. *Hibbard v. Wilkie*, No. 20-0080, 2021 WL 96893 (Vet. App. Jan. 12, 2021); Appx. 1-5. Ms. Hibbard now appeals to us. We affirm.

I

Ronald Hibbard served in the United States Air Force from May 1966 to March 1970 and in the Army from August 1970 to November 1986. In November 1986, Mr. Hibbard filed a claim for disability benefits based on an allegedly service-connected bilateral knee condition, but the VA regional office denied the claim. Mr. Hibbard did not appeal the denial. He died in July 2007. He had filed no disability-benefits claim asserting a service-connected condition other than the November 1986 claim that had been denied.

Faith Hibbard, Mr. Hibbard's surviving spouse, sought dependency and indemnity compensation under 38 U.S.C. § 1310(a), at the rate specified in 38 U.S.C. § 1311(a)(1). VA eventually awarded the benefit in 2016. In March 2017, Ms. Hibbard sought enhanced dependency and indemnity compensation under 38 U.S.C. § 1311(a)(2), which provides increased benefits when the veteran, at the time of death, "was in receipt of or was entitled to receive . . . compensation for a service-connected disability that was rated totally disabling for a continuous period of at least eight years immediately preceding death." 38 U.S.C. § 1311(a)(2); 38 C.F.R. § 3.10(c). The regional office denied Ms. Hibbard's claim, and she appealed to the Board.

The Board found that Mr. Hibbard was not receiving compensation for any service-connected disability at the time of his death. The Board also found that Mr. Hibbard was not, at the time of his death, “entitled to receive” such compensation. Appx. 13–16. For that conclusion, the Board reasoned that the governing regulatory definition of “was entitled to receive,” 38 C.F.R. § 3.10(f)(3), precluded the “hypothetical entitlement” theory presented by Ms. Hibbard, namely, that Mr. Hibbard would have received benefits for a disability lasting the required period of time had he applied for them. Appx. 15 (citing *Nat’l Org. of Veterans’ Advocates, Inc. v. Sec’y of Veterans Affairs*, 476 F.3d 872, 876–77 (Fed. Cir. 2007)). Thus, the Board found that the statutory requirement for enhanced benefits under 38 U.S.C. § 1311(a)(2) was not met, and it denied Ms. Hibbard’s claim for enhanced benefits.

Ms. Hibbard appealed to the Veterans Court. The Veterans Court, conducting the same analysis of 38 U.S.C. § 1311(a)(2) and 38 C.F.R. § 3.10(f) as the Board, affirmed, holding that the Board had correctly applied the law and provided sufficient explanation for its decision. *Hibbard*, 2021 WL 96893, at *3.

Ms. Hibbard timely appealed to this court.

II

This court’s jurisdiction to review decisions of the Veterans Court, defined by 38 U.S.C. § 7292, is limited. We have jurisdiction to decide an appeal insofar as it presents a challenge to a Veterans Court’s decision regarding a rule of law, including a decision about the interpretation or validity of any statute or regulation. *Id.* § 7292(a), (d)(1). We lack jurisdiction to entertain a challenge to a factual determination or a challenge to the application of a law or regulation to the facts of a particular case where, as here, the appeal presents no constitutional issue. *Id.* § 7292(d)(2).

When a veteran dies “from a service-connected or compensable disability,” the veteran’s “surviving spouse, children, and parents” are eligible for “dependency and indemnity compensation.” 38 U.S.C. § 1310(a). The basic rate of dependency and indemnity compensation for a surviving spouse is currently \$1,154 per month. 38 U.S.C. § 1311(a)(1); 38 C.F.R. § 3.10(b). That benefit is increased by a certain amount (currently \$246 per month) “in the case of the death of a veteran who at the time of death was in receipt of or *was entitled to receive* . . . compensation for a service-connected disability that was rated totally disabling for a continuous period of at least eight years immediately preceding death.” 38 U.S.C. § 1311(a)(2) (emphasis added); 38 C.F.R. § 3.10(c).

An agency regulation, 38 C.F.R. § 3.10(f)(3), defines the “was entitled to receive” standard of 38 U.S.C. § 1311(a)(2) and 38 C.F.R. § 3.10(c). The regulation requires that the veteran had “filed a claim for disability compensation during his or her lifetime” *and* that any of three further conditions be met: (1) the veteran would have received the qualifying total-disability compensation “but for clear and unmistakable error committed by VA in a decision on a claim filed during the veteran’s lifetime”; (2) additional evidence in the form of “service records that existed at the time of a prior VA decision but were not previously considered” in that decision, would permit reopening a claim decided in the veteran’s life to award the requisite total-disability compensation; or (3) the veteran, at the time of death, had “a service-connected disability recognized that was continuously rated totally disabling by VA for [the requisite eight-year period], but was not receiving compensation” for it for one of a few enumerated reasons. 38 C.F.R. § 3.10(f)(3).

The Veterans Court found that Mr. Hibbard, during his lifetime, had filed only the single denied claim seeking disability compensation in 1986 for the bilateral knee condition. *Hibbard*, 2021 WL 96893, at *3. Next, considering

the three possible qualifying circumstances described in 38 C.F.R. § 3.10(f)(3), the Veterans Court found that (1) Ms. Hibbard had presented no evidence of clear or unmistakable error related to that denial, (2) she had not put forward any additional service records that VA had not considered that might establish a basis for the requisite total-disability compensation, and (3) Mr. Hibbard did not have a service-connected condition recognized by VA in a total-disability rating before his death. *Id.* Thus, the Veterans Court concluded that Mr. Hibbard had not been “entitled to receive” the requisite total-disability compensation and, therefore, Ms. Hibbard was not entitled to the enhanced benefits.

To the extent that Ms. Hibbard challenges the Veterans Court’s determination that Mr. Hibbard did not fall within the agency definition of “was entitled to receive,” we lack jurisdiction to review that determination. 38 U.S.C. 7292(d)(2). But Ms. Hibbard also questions the validity of 38 C.F.R. § 3.10(f)(3) by contending that the language “was entitled to receive” may encompass cases where, even though the veteran dies without filing a claim, the surviving spouse files an “initial claim” seeking enhanced dependency and indemnity compensation. See Hibbard Informal Br. 9–10. The validity of a regulation is a legal question within our jurisdiction.

In *National Organization of Veterans’ Advocates, Inc. v. Secretary of Veterans Affairs*, 476 F.3d 872 (Fed. Cir. 2007) (*NOVA*), we considered the then-newly promulgated definition of “was entitled to receive” in 38 C.F.R. § 3.10(f)(3). *Id.* at 875–76. That definition differed critically from a previous regulation that had permitted the surviving spouse to present new and material evidence of a service-connected totally disabling condition to meet the “was entitled to receive” requirement of 38 U.S.C. § 1311(a)(2). *Id.* at 874–75 (citing *Hix v. Gober*, 225 F.3d 1377, 1380–81 (Fed. Cir. 2000)). We observed that the phrase “entitled to receive” as it appears in 38 U.S.C.

§ 1311(a)(2) was ambiguous, and we held that VA's new interpretation was reasonable and hence lawful. *Id.* at 876 (citing *Chevron, U.S.A., Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837 (1984)). We relied on the agency rationale of aligning the exceptional "was entitled to receive" situations with the few situations in which a veteran may obtain "retroactive" compensation for a service-connected condition. *Id.*

None of Ms. Hibbard's arguments undermine our previous holding, which recognized the possibility of an as-applied challenge to 38 C.F.R. § 3.10(f)(3) if it were applied to deny compensation in circumstances where the veteran would have qualified for retroactive compensation had the veteran filed a claim prior to death. *NOVA*, 476 F.3d at 876. Ms. Hibbard has not shown that Mr. Hibbard's situation would have qualified him for retroactive compensation for the required service-connected condition. Rather, Ms. Hibbard suggests a much broader interpretation of "was entitled to receive" similar to that of the agency's previous regulation, but we squarely held in *NOVA* that the agency reasonably (and hence lawfully) departed from that earlier regulation. *Id.* And Ms. Hibbard's other arguments based on *Henderson v. Shinseki*, 562 U.S. 428 (2011), the definition of "initial claim" in 38 C.F.R. § 3.1(p)(1), and regulations governing the interpretation of examination reports at 38 C.F.R. § 4.2 fail to address the relevant scenario of claims for enhanced dependency and indemnity compensation under 38 U.S.C. § 1311(a)(2). See *Hibbard Informal Br.* 10–14.

III

For the foregoing reasons, we affirm the decision of the Veterans Court.

The parties shall bear their own costs.

AFFIRMED

APPENDIX B

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

Designated for electronic publication only

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 20-0080

FAITH HIBBARD, APPELLANT,

v.

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

Before ALLEN, *Judge*.

MEMORANDUM DECISION

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

ALLEN, *Judge*: Self-represented appellant Faith Hibbard is the surviving spouse of veteran Ronald Hibbard who served the Nation honorably in both the United States Army and the United States Air Force. She appeals a September 19, 2019, Board of Veterans' Appeals decision that denied her entitlement to enhanced dependency and indemnity compensation (DIC) benefits under 38 U.S.C. § 1311(a)(2).¹ Because the Board correctly applied the law, fully explained its decision, and did not commit clear error concerning its factual findings, we will affirm.

I. BACKGROUND

The veteran passed away in July 2007.² His death certificate lists rectal cancer, liver metastases, and anemia as the causes of death.³ The veteran was not service-connected for any conditions at the time of his death. In addition, he had no pending claims seeking service connection at that time. Over the course of his life, the veteran sought VA disability compensation only one time. In November 1986, he filed a claim seeking service connection for a bilateral knee

¹ Record (R.) at 3-9.

² R. at 1765.

³ *Id.*

condition.⁴ After development, in July 1987, a VA regional office (RO) denied the veteran's claim.⁵ The veteran did not appeal this denial.

Shortly after the veteran's death, appellant first sought DIC benefits based on the cause of her husband's death. Her claim was denied in December 2007 and she did not appeal.⁶ Eventually, appellant sought to reopen her claim. After proceedings not relevant to this appeal, VA reopened her claim and, in an April 2016 Board decision, granted appellant entitlement to DIC benefits based on the cause of the veteran's death.⁷

In March 2017, appellant sought enhanced DIC benefits under section 1311(a)(2).⁸ In a September 2017 rating decision, the RO denied her claim.⁹ Appellant disagreed with the decision and the matter eventually reached the Board. The Board denied appellant entitlement to enhanced DIC benefits in the September 2019 decision before the Court. This appeal followed.

II. ANALYSIS

Because appellant is proceeding pro se, she is entitled to a liberal construction of her arguments.¹⁰ But she still carries the burden of demonstrating error in the Board's decision on appeal.¹¹ Liberally construing the arguments in her informal brief, appellant contends that the Board incorrectly applied the law when it denied her entitlement to enhanced DIC because, she claims, her husband should have been in receipt of service-connection benefits before his death for a period that would have entitled her to the enhanced benefit she seeks. We also construe her brief to argue that the Board did not comply with its obligation to support all its material factual determinations and legal conclusions with a written statement of reasons or bases that is "adequate to enable a claimant to understand the precise basis for the Board's decision, as well as to facilitate review in this Court."¹² The Secretary defends the Board's decision in full. He asks us to affirm.

⁴ R. at 1883-84.

⁵ R. at 1855-56.

⁶ See R. at 578.

⁷ R. at 577-87.

⁸ R. at 198-234.

⁹ R. at 171-72.

¹⁰ See *De Perez v. Dervinski*, 2 Vet.App. 85, 86 (1992).

¹¹ See 38 U.S.C. § 7261(b)(2); *Shinseki v. Sanders*, 556 U.S. 396, 409 (2009).

¹² *Allday v. Brown*, 7 Vet.App. 517, 527 (1995).

Congress has provided that a person in receipt of DIC benefits may receive additional compensation under certain circumstances. At issue here is 38 U.S.C. § 1311(a)(2), which provides in relevant part as follows:

The rate under paragraph (1) shall be increased by _____ in the case of a death of a veteran who at the time of death was in receipt of or was entitled to receive (or but for the receipt of retired pay or retirement pay was entitled to receive) compensation for a service-connected disability that was rated totally disabling for a continuous period of at least eight years immediately preceding death. In determining the period of a veteran's disability for purposes of the preceding sentence, only periods in which the veteran was married to the surviving spouse shall be considered.^{13]}

The veteran was not "in receipt of . . . compensation for a service-connected disability that was rated totally disabling for a period of at least eight years immediately preceding death."¹⁴ Indeed, it is uncontested that the veteran was not in receipt of compensation for any service-connected condition at the time of his death. So, if appellant is to prevail on her appeal, it must be that the veteran "was entitled to receive . . . compensation for a service-connected disability that was rated totally disabling for a period of at least eight years immediately preceding death."¹⁵

VA regulations define what it means to be "entitled to receive" a benefit for purposes of enhanced DIC benefits. Specifically, 38-C.F.R. § 3.10(f)(3) provides in relevant part:

As used in paragraph (c) of this section [mirroring section 1311(a)(2)], the phrase "entitled to receive" means that the veteran filed a claim for disability compensation during his or her lifetime and one of the following circumstances is satisfied:

(i) The veteran would have received total disability compensation for the [eight-year period specified in section 1311(a)(2)] but for clear and unmistakable error committed by VA in a decision on a claim filed during the veteran's lifetime; or

(ii) Additional evidence submitted to VA before or after the veteran's death, consisting solely of service department records that existed at the time of a prior VA decision but were not previously considered by VA, provides a basis for reopening a claim finally decided during the veteran's lifetime and for awarding a total service-connected disability rating retroactively . . . for the [eight-year period specified in section 1311(a)(2)]; or

¹³ 38 U.S.C. § 1311(a)(2). We have omitted a specific dollar amount for the increased DIC benefit (which is currently an additional \$246.00 per month) because that can change each year. In any event, the specific amount of increase is not an issue in this appeal.

¹⁴ *Id.*

¹⁵ *Id.*

(iii) At the time of death, the veteran had a service-connected disability that was continuously rated totally disabling by VA for the [eight-year period specified in section 1311(a)(2)], but was not receiving compensation [for six enumerated reasons].¹⁶

The Board correctly identified the regulatory framework applicable to appellant's claim with respect to whether the veteran was "entitled to receive" the necessary benefit at death.¹⁷ It then proceeded to explain why appellant did not qualify.¹⁸ The Board was correct.

During his lifetime, the veteran filed only one claim seeking VA disability compensation. This was the claim he filed in 1986 seeking service connection for a bilateral knee disability,¹⁹ a claim denied in a 1987 rating decision.²⁰ So, appellant must be able to satisfy one of the three prerequisites set forth in § 3.10(f)(3)(i)-(iii) to prevail on her claim. Subsection (i) is unhelpful for appellant. Appellant has never asserted that the 1987 rating decision denying the veteran's claim for service connection contained clear and unmistakable error. And there is no indication that it did. Appellant fares no better under subsection (ii). There is nothing to suggest that the RO did not have the veteran's service records at the time of the 1987 decision. In fact, there is evidence that the RO considered the veteran's service records when it denied service connection for a bilateral knee condition.²¹ And appellant has not identified any records that qualify under subsection (ii). Finally, subsection (iii) is not applicable because appellant did not have the requisite service-connected condition at the time of his death so the list of reasons why compensation might not have been paid is irrelevant.

The Board correctly recognized that appellant was arguing that she is entitled to enhanced DIC benefits under a hypothetical entitlement theory.²² In other words, she claimed that enhanced DIC is appropriate because had her husband – hypothetically – sought service connection for the conditions that caused his death, he would have been in receipt of a total disability rating for the eight-years section 1311(a)(2) requires. However, the law does not allow for such a hypothetical

¹⁶ 38 C.F.R. § 3.10(f)(3) (2020).

¹⁷ R. at 6-8.

¹⁸ R. at 8-9.

¹⁹ R. at 1883-84.

²⁰ R. at 1855-56.

²¹ R. at 1855, 1858.

²² R. at 7.

entitlement theory.²³ VA regulations require that entitlement to enhanced DIC under section 1311(a)(2) "must be decided based on determinations made during the veteran's lifetime."²⁴ That is exactly the rule applied Board in the decision before us.

In sum, the Board's statement of reasons or bases for its decision is sufficient for us to engage in meaningful judicial review. After a careful review of the record, we conclude that the Board applied the correct legal principles and can't say that its factual determinations are clearly erroneous. So, while we understand appellant's frustration and appreciate the veteran's service, we must affirm the Board's decision denying enhanced DIC benefits under 38 U.S.C. § 1311(a)(2).

III. CONCLUSION

After consideration of the parties' briefs, the governing law, and the record, the Court AFFIRMS the September 19, 2019, Board decision.

DATED: January 12, 2021

Copies to:

Faith Hibbard

VA General Counsel (027)

²³ See, e.g., *Moffit v. McDonald*, 776 F.3d 1359, 1362-69 (Fed. Cir. 2015); *Kernea v. Shinseki*, 724 F.3d 1374, 1377-78 (Fed. Cir. 2013); see also *Nat'l Org. of Veterans' Advocates v. Sec'y of Veterans Affairs*, 476 F.3d 872, 975-77 (Fed. Cir. 2007) (upholding regulations precluding hypothetical entitlement theory).

²⁴ 38 C.F.R. § 20.1106 (2020).