No. 26-___

IN THE

Supreme Court of the United States

LINDA KAY ROBISON,

Petitioner,

v.

DOUGLAS A. COLLINS, SECRETARY
UNITED STATES DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Men and women who serve this Nation in uniform earn benefits Congress has provided for their service. Congress has recognized that, when a veteran dies, benefits due and unpaid during the veteran's lifetime may belong to the surviving spouse or other eligible beneficiary. But under the current rule, when the Department of Veterans Affairs erroneously denies a veteran benefits and the veteran dies before the error is corrected, the survivor is not able to recover the benefits that should have been paid.

The surviving spouse is blocked by *Haines v. West*, in which the Federal Circuit held that a surviving spouse lacks standing to seek revision of a deceased veteran's VA decision based on clear and unmistakable error (CUE). Consequently, an alleged government error may never be examined on its merits, and benefits wrongfully withheld during the veteran's lifetime may never be paid to an eligible survivor.

Mrs. Robison's case presents an important question concerning two statutes Congress enacted to protect veterans and their survivors: 38 U.S.C. §§ 5109A and 5121. § 5109A provides for revision of VA decisions based on CUE, while § 5121 provides for payment of benefits due and unpaid at a veteran's death. Read together, these statutes should permit an eligible survivor to seek correction of an erroneous decision when that correction could establish entitlement to accrued benefits.

Whether 38 U.S.C. §§ 5109A and 5121, together, permit the survivor of a deceased veteran to seek revision based on clear and unmistakable error, of a VA decision made during the veteran's lifetime to obtain benefits due and unpaid at the veteran's death; or whether the bar from *Haines v. West* bars survivors from obtaining review of error on the merits.

PARTIES TO THE PROCEEDINGS

All parties are named in the caption.

Petitioner, Linda Kay Robison, was the appellant in the circuit court case.

Respondent, Douglas A. Collins, Secretary of the United States Department of Veterans Affairs, was the appellee in the circuit court case.

CORPORATE DISCLOSURE STATEMENT

This proceeding does not involve any non governmental corporations.

RELATED PROCEEDINGS

This petition arises from the following proceedings:

- *Robison v. Collins,* No. 25-1328 (Fed. Cir. Aug. 13, 2026);
- *Robison v. McDonough,* No. 23-5922 (Vet. App. Nov. 13, 2024).

Counsel is not aware of any other proceedings that are directly related to this case within the meaning of Rule 14.1(b)(iii).

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PETITION FOR A WRIT OF CERTIORARI

Linda Kay Robison respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

ORDERS FROM LOWER COURTS AND ADMINISTRATIVE AGENCIES

The Federal Circuit's opinion was not reported but is available at *Robison v. Collins*, 2025-1328 (Fed. Cir. Jun 02, 2026)(vlex Fastcase) and is reproduced at App.4a. The Federal Circuit order denying full court review is not reported and is reproduced at App.2a. The opinion from the Veterans Court is an unpublished opinion, which is reproduced at 8a. The opinion from the Board of Veterans Appeals is reproduced at App.12a.

JURISDICTION

The Federal Circuit dismissed the case on June 2, 2026; and, denied the Petition for Rehearing En Banc on August 13, 2026. App. 2a. Accordingly, jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

Text of 38 U.S.C. § 5109A:

(a) A decision by the Secretary under this chapter 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.

(b) For the purposes of authorizing benefits, a rating or other adjudicative decision that constitutes a reversal or revision of a prior deci-

sion on the grounds of clear and unmistakable error has the same effect as if the decision had been made on the date of the prior decision.

(c) Review to determine whether clear and unmistakable error exists in a case may be instituted by the Secretary on the Secretary's own motion or upon request of the claimant.

(d) A request for revision of a decision of the Secretary based on clear and unmistakable error may be made at any time after that decision is made.

(e) Such a request shall be submitted to the Secretary and shall be decided in the same manner as any other claim.

Text of 38 U.S.C. § 5121:

(a) Except as provided in sections 3329 and 3330 of title 31, periodic monetary benefits (other than insurance and servicemen's indemnity) under laws administered by the Secretary to which an individual was entitled at death under existing ratings or decisions or those based on evidence in the file at date of death (hereinafter in this section and section 5122 of this title referred to as "accrued benefits") and due and unpaid, shall, upon the death of such individual be paid as follows:

(1) Upon the death of a person receiving an apportioned share of benefits payable to a veteran, all or any part of such benefits to the veteran or to any other dependent or dependents of the veteran, as may be determined by the Secretary.

(2) Upon the death of a veteran, to the living person first listed below:

(A) The veteran's spouse.

(B) The veteran's children (in equal shares).

(C) The veteran's dependent parents (in equal shares).

(3) Upon the death of a surviving spouse or remarried surviving spouse, to the children of the deceased veteran.

(4) Upon the death of a child, to the surviving children of the veteran who are entitled to death compensation, dependency and indemnity compensation, or death pension.

(5) Upon the death of a child claiming benefits under chapter 18 of this title, to the surviving parents.

(6) In all other cases, only so much of the accrued benefits may be paid as may be necessary to reimburse the person who bore the expense of last sickness and burial.

(b) No part of any accrued benefits shall be used to reimburse any political subdivision of the United States for expenses incurred in the last sickness or burial of any beneficiary.

(c) Applications for accrued benefits must be filed within one year after the date of death. If a claimant's application is incomplete at the time it is originally submitted, the Secretary shall notify the claimant of the evidence necessary to complete the application. If such evidence is not received within one year from

the date of such notification, no accrued benefits may be paid.

STATEMENT OF THE CASE

38 U.S.C. §§ 5109A and 5121 should together provide the mechanism for the widow of a deceased veteran to obtain benefits from the government that were wrongfully withheld during the veteran's lifetime. Section 5109A(a) states that if evidence establishes a clear and unmistakable error the prior decision shall be reversed or revised; Section 5109A(b) states that a revision based on CUE has the same effect as if the decision had been made on the date of the prior decision; and, Section 5109A(c) says review for clear and unmistakable error may be instituted by the Secretary or upon the request of the claimant.

Section 5121 should be read together with Section 5109A, to assist the widow of a deceased veteran to present a claim for accrued benefits, which are benefits the veteran was entitled to receive before he died under existing ratings or decisions, or those that were due and unpaid based on evidence in the file on the date of the veteran's death. *Zevalkink v. Brown*, 102 F.3d 1236, 1242 (Fed. Cir. 1996), cert. denied, 521 U.S. 1103 (1997).

The Government routinely uses precedent from the Federal Circuit decisions from *Haines v. West*, 154 F.3d 1298 (Fed. Cir. 1998), cert. denied, 526 U.S. 1016 (1999); and, *Crews v. McDonough*, 63 F.4th 37 (Fed. Cir. 2023), cert. denied, 601 U.S. ___ (2023), as authority to bar widows of veterans from submitting CUE claims to seek benefits that had been due and unpaid to the veteran during that veteran's lifetime,

in cases where clear and unmistakable error had been committed by the government.

On January 8, 1999, Linda Kay Robison was married to Veteran, Gerald G. Robison, when he made a claim for Veterans' Benefits after suffering a stroke. The VA issued a rating decision granting Mr. Robison a non-service connected pension rather than service-connected disability, even though the VA decision acknowledged Mr. Robison was 90% disabled and unable to follow a substantially gainful occupation due to disability. The way the VA structured this veteran's benefits drastically reduced the benefits he received.

On June 22, 2007, Mr. Robison died. On July 6, 2007, Mrs. Robison submitted her claims for Dependency and Indemnity Compensation, Death Pension and Accrued Benefits. After many years of denials and appeals, on June 2, 2020, the VA issued a decision that acknowledged the Veteran died from cardiovascular conditions resulting from his exposure to diesel fuel in the military, and granted service connection for the cause of his death.

On August 26, 2020, Mrs. Robison submitted a supplemental claim to allege the VA committed CUE on June 2, 1999, when VA granted pension benefits rather than service-connected benefits. On September 10, 2020, the VA's decision did not grant her CUE claim. On September 19, 2020, Counsel filed an appeal to the Board of Veterans Appeals; and, on August 25, 2023, the Board dismissed Mrs. Robison's appeal with a finding she lacked standing to make the CUE claim.

On September 28, 2023, Mrs. Robison filed her appeal at the Veterans' Court; and, on October 22,

2024, the Veterans Court affirmed the Board of Veterans Appeals dismissal of the case. On December 18, 2024, Mrs. Robison filed her notice of appeal to the Federal Circuit; and, on June 2, 2026, the Federal Circuit dismissed Mrs. Robison's case due to its perception that the Court lacked jurisdiction. On July 13, 2026, Mrs. Robison filed her Petition for Rehearing En Banc; and, on August 13, 2026, the Federal Circuit denied Mrs. Robison's Petition for Rehearing.

ARGUMENT

There is a compelling reason to grant Mrs. Robison's petition: a United States court of appeals issued decisions that disenfranchise survivors of deceased veterans on an important question of federal law that this Court has not yet resolved, but urgently needs to settle.

A. 38 U.S.C. §§ 5109A and 5121 should be read together, because together they authorize survivors of deceased veterans a mechanism to correct errors and obtain wrongfully withheld benefits.

Congress enacted Section 5109A to correct erroneous VA decisions, including through revision with retroactive effect under subsection (b); and Congress enacted Section 5121 to protect eligible survivors' interests to obtain accrued benefits.

The facts of Mrs. Robison's case meet requirements from the combined authority Congress enacted in Sections 5109A and 5121.

The VA, Board of Veterans Appeals, Veterans Court, and Federal Circuit have all refused to allow Mrs. Robison from using CUE to seek the benefits

that were clearly, unmistakably and erroneously underpaid during the lifetime of the veteran. This was because, precedent setting decisions from *Haines v. West* and *Crews v. McDonough* were decided by the Federal Circuit, and the Supreme Court denied Petitions for Certiorari that were filed by Mrs. Haines and Mrs. Crews, and the decisions made by the Federal Circuit have stood to bar similarly situated survivors from pursuing CUE claims.

In Haines v. West, the Widow focused on 38 U.S.C. § 5121, while in *Crews v. McDonough*, the Widow focused on 38 U.S.C. § 5121A. The focus of Mrs. Robison's argument has been that the combination of 38 U.S.C. §§ 5109A and 5121 does authorize her to submit a claim for CUE to recover benefits that the VA wrongfully withheld from her veteran husband during his lifetime.

The precedent from *Haines v. West* and *Crews v. McDonough* is wrong, and Mrs. Robison asked the Federal Circuit to reverse itself like it did when it decided *Procopio v. Wilkie*, 913 F.3d 1371 (Fed. Cir. 2019); because in *Procopio*, the Federal Circuit overruled precedent from *Haas v. Peake*, 525 F.3d 1168 (Fed. Cir. 2008). Mrs. Robison asked the Federal Circuit to perform a textual analysis for her case, like the Court did when it decided *Procopio*.

B. Mrs. Robison adopted arguments Mrs. Haines and Mrs. Crews presented with their Petitions for Certiorari.

Mrs. Robison's briefs to the Veterans Court and the Federal Circuit adopted arguments Mrs. Haines and Mrs. Crews made in their Petitions for Certiorari:

1. Refusing to permit CUE claims to survive a claimant's death contravenes Congressional

intent; and moreover, can allow an erroneous decision to stand, subverting systemic fairness, thereby undermining the credibility and reliability of the entire adjudication process;

2. A CUE is a remedial claim designed to correct a prior error, and under federal common law, remedial actions survive the death of a plaintiff; and,

3. Since 38 U.S.C. § 5109A authorized the Veteran to file for CUE during his lifetime, the CUE should survive the Veteran's death.

i. Congressional intent and allowing an erroneous decision to stand.

Mrs. Haines and Mrs. Crews both argued refusing a surviving spouse standing to file a CUE claim contravenes Congressional intent, which can allow an erroneous decision to stand, subverting systemic fairness, thereby undermining the credibility and reliability of the entire adjudication process.

This issue applies to Mrs. Robison, because under § 5109A(a), evidence that a CUE exists in the file creates a situation where the government must revise or reverse the erroneous decision; and under § 5109A(b) revision for CUE has a retroactive effect. Moreover, Section 5121 provides that all living persons who would be eligible for accrued benefits should be entitled to claim benefits that were "due and unpaid" at the time of the death of the veteran.

The plain language of these statutes makes the Federal Circuit's decisions in *Haines v. West* and *Crews v. McDonough* incorrect, because those out-

comes are contrary to the plain language of the statutes and the Congressional intent behind those statutes. That means the precedents set by *Haines v. West* and *Crews v. McDonough* have negatively affected Mrs. Robison, and all similarly situated VA widow claimants.

ii. The denials of Certiorari in *Haines* and *Crews* mean that the Supreme Court has yet to rule on this issue.

Although Mrs. Haines and Mrs. Crews focused on Sections 5121 and 5121A, both argued that statutes governing veterans benefits are strongly and uniquely pro-claimant; and, Congress designed the veterans benefits adjudication process to be a non-adversarial, ex parte, paternalistic system. *Hodge v. West*, 155 F.3d 1356, 1362 (Fed. Cir. 1998) and *Collaro v. West*, 136 F.3d 1304, 1309-10 (Fed. Cir. 1998).

Revision based upon clear and unmistakable error is a critical safety valve in this context, where final denials are often infected by erroneous legal interpretations that are corrected only years, or decades, after the fact. Without the clear and unmistakable error device, a claimant is at best limited to recovering compensation starting on the date he or she learns of the legal error and files a new or supplemental claim based on that development.

That keeps claimants from having a way to recover benefits for the time it took the agency and the courts to realize that the law had actually entitled compensation all along. Since the Supreme Court never ruled on whether a surviving spouse has standing to present a CUE claim for errors that took place during

the lifetime of the veteran, this issue remains unresolved, open, and unsettled.

C. The Federal Circuit improperly dismissed Mrs. Robison's appeal without addressing her statutory interpretation argument and request to reconsider binding precedent.

38 U.S.C. § 7292(a) authorized the Federal Circuit to decide the question involving the interpretation of §§ 5109A and 5121, when read together, so dismissing Mrs. Robison's appeal for lack of jurisdiction was error. The Federal Circuit's order dismissing Mrs. Robison's appeal contained the following footnote:

> Even if we had jurisdiction, Robison does not argue that her case is distinguishable from *Haines* and *Crews*. *See* Robison Open. Br. 16. She asks only that the panel reverse that precedent but does not point us to any intervening decision. *Id.* at 5-8. We thus cannot do so, as we are "bound by the determinations of a prior panel, unless relieved of that obligation by ab en banc order of the court or a decision of the Supreme Court." *See Deckers Corp. v. United States*, 752 F.3d 949, 959 (Fed. Cir. 2014).

The Panel of the Court dismissed Mrs. Robison's appeal for want of Subject Matter Jurisdiction; but the dismissal overlooked Fed. Cir. R. 40(a)(4), which permitted Mrs. Robison to make her argument to the panel that sought to override the binding precedent; consequently, the panel committed error when it dismissed for Subject Matter Jurisdiction when it could have made a determination to send the case to the Court en banc.

That means the Federal Circuit did not decide whether 38 U.S.C. § 5109A, read together with § 5121, permits a surviving spouse to seek revision of a veteran's lifetime VA decision based on CUE.

CONCLUSION

This case contains an important question of federal law that has not been, but should be, settled by this Court. Mrs. Robison has argued that 38 U.S.C. §§ 5109A and 5121, when read together, do authorize widows and other survivors of veterans to submit claims for clear and unmistakable error, to obtain benefits that were erroneously withheld from that veteran during his or her lifetime.

Current precedent from the Federal Circuit cases: *Haines v. West* and *Crews v. McDonough* have barred widows from making CUE claims. Both Mrs. Haines and Mrs. Crews filed Petitions for Certiorari at the Supreme Court, but the Court did not hear those cases. Accordingly, Mrs. Robison adopted arguments that Mrs. Haines and Mrs. Crews submitted in case the Court grants this petition.

Mrs. Robison asked the Federal Circuit to reverse its precedent from *Haines* and *Crews* like it did in *Procopio v. Wilkie,* because in *Procopio,* the Federal Circuit reversed itself and overruled many years of incorrect precedent. Nevertheless, the Federal Circuit did not rule on Mrs. Robison's argument about reading the statutes together, nor did it consider her argument about CUE; instead, the Federal Circuit dismissed her case due to its perception that it lacked jurisdiction over her case. Mrs. Robison has included argument that the Federal Circuit's dismissal for lack of jurisdiction was error.

Respectfully submitted,

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November 11, 2026

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

2025-1328

LINDA KAY ROBISON,
Claimant-Appellant

v.

DOUGLAS A. COLLINS, SECRETARY OF VETERANS AFFAIRS,
Respondent-Appellee

Appeal from the United States Court of Appeals for Veterans Claims in No. 23-5922, Judge Coral Wong Pietsch.

MANDATE

In accordance with the judgment of this Court, entered June 2, 2026, and pursuant to Rule 41 of the Federal Rules of Appellate Procedure, the formal mandate is hereby issued.

FOR THE COURT

[Seal]
Jarret B. Perlow
Clerk of Court

August 20, 2026
Date

APPENDIX B

NOTE: This order is nonprecedential.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

2025-1328

LINDA KAY ROBISON,

Claimant-Appellant

v.

DOUGLAS A. COLLINS,
SECRETARY OF VETERANS AFFAIRS,

Respondent-Appellee

Appeal from the United States Court of Appeals for Veterans Claims in No. 23-5922,
Judge Coral Wong Pietsch.

ON PETITION FOR REHEARING EN BANC

Before MOORE, *Chief Judge*, LOURIE, DYK, PROST, REYNA, TARANTO, CHEN, HUGHES, STOLL, CUNNINGHAM, and STARK, *Circuit Judges*.[1]

PER CURIAM.

[1] Circuit Judge Newman did not participate.

ORDER

Linda Kay Robison filed a petition for rehearing en banc. The petition was first referred to the panel that heard the appeal, and thereafter the petition 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.

FOR THE COURT

[Seal]
Jarret B. Perlow
Clerk of Court

August 13, 2026
Date

APPENDIX C

NOTE: This disposition is nonprecedential.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

2025-1328

LINDA KAY ROBISON,

Claimant-Appellant

v.

DOUGLAS A. COLLINS,
SECRETARY OF VETERANS AFFAIRS,

Respondent-Appellee

Appeal from the United States Court of Appeals for Veterans Claims in No. 23-5922,
Judge Coral Wong Pietsch.

Decided: June 2, 2026

ROBERT C. BROWN, JR., Tommy Klepper & Associates, PLLC, Norman, OK, for claimant-appellant.

REBECCA TAYLOR MITCHELL, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, for respondent-appellee. Also represented by MARTIN F. HOCKEY, JR., PATRICIA M. MCCARTHY, BRETT SHUMATE; TYRONE COLLIER, DEREK SCADDEN, Office of General Counsel, United States Department of Veterans Affairs, Washington, DC.

Before LOURIE, HUGHES, and STOLL, *Circuit Judges*. PER CURIAM.

Linda Kay Robison appeals from a decision of the United States Court of Appeals for Veterans Claims ("the Veterans Court") affirming the decision of the Board of Veterans' Appeals ("the Board") dismissing a claim of clear and unmistakable error ("CUE") in a May 1999 rating decision that awarded non-service-connected pension benefits to her now-deceased spouse, veteran Gerald Glen Robison. *See Robison v. McDonough*, No. 23-5922, 2024 WL 4539849 (Vet. App. Oct. 22, 2024) ("*Veterans Court Decision*"); *see also* J.A. 5–10 ("*Board Decision*"). Because we lack jurisdiction over the appeal, we *dismiss*.

BACKGROUND

Veteran Robison served in the United States Air Force from January 1962 to January 1966. *Veterans Court Decision*, 2024 WL 4539849, at *1. In May 1999, he was awarded non-service-connected pension benefits. *Id.* He passed away in June 2007. *Id.*

In August 2020, appellant Robison filed a claim alleging CUE in the May 1999 rating decision. *Id.* After the Veterans Affairs Regional Office denied her claim, she appealed to the Board. *See id.*; J.A. 24–26. The Board dismissed Robison's claim because she was not the claimant––*i.e.*, veteran Robison––and so she lacked standing to file the CUE claim. *See Veterans Court Decision*, 2024 WL 4539849, at *1; *Board Decision*, J.A. 7–8. Robison then appealed to the Veterans Court. *Veterans Court Decision*, 2024 WL 4539849, at *1.

On appeal to the Veterans Court, Robison acknowledged that, under our precedent, she did not have standing to bring her CUE claim. *Id.* (first citing

Haines v. West, 154 F.3d 1298, 1301 (Fed. Cir. 1998); and then citing *Crews v. McDonough*, 63 F.4th 27, 41 (Fed. Cir. 2023)). She did not identify any error in law or fact with the Board's decision. *Id.* The Veterans Court accordingly affirmed the Board's dismissal of her CUE claim. *Id.* at 2. Robison appealed to our court.

DISCUSSION

Our jurisdiction to review decisions of the Veterans Court is limited. *Wanless v. Shinseki*, 618 F.3d 1333, 1336 (Fed. Cir. 2010). We have jurisdiction to review decisions of the Veterans Court with respect to a rule of law or interpretation of a statute or regulation relied on by the Veterans Court in its decision. 38 U.S.C. § 7292(a). However, except with respect to constitutional issues, we may not review challenges to factual determinations or challenges to the application of a law or regulation to the facts of a case. *Id.* § 7292(d)(2).

"[B]y the express terms of [38 U.S.C. § 5109A(d)], a survivor has no standing to request review of a decision affecting the disability benefits of a veteran on the ground of CUE; the survivor is not the disability benefits claimant." *Haines*, 154 F.3d at 1301; *see also Crews*, 63 F.4th at 41 (explaining that 38 U.S.C. § 5121A, which provides for substitution in the event of the death of a claimant, "does not allow a survivor to bring a CUE claim that was not previously raised"). Here, Robison concedes that such precedent "bar[s] similarly situated widows from presenting CUE claims." Robison Open. Br. 4 (first citing *Haines*, 154 F.3d at 1301; and then citing *Crews*, 63 F.4th at 41); *see also id.* at 10. Given that concession, Robison is in essence asking us to determine whether the Veterans Court correctly applied

Haines and *Crews* to her case. That argument does not bring her appeal under our jurisdiction, as it is a challenge to the Veterans Court's application of our law to the facts of Robison's case. *See* 38 U.S.C. § 7292(d)(2). Accordingly, we *dismiss*.[1]

CONCLUSION

We have considered Robison's remaining arguments but find them unpersuasive. For the foregoing reasons, we *dismiss* her appeal for lack of jurisdiction.

DISMISSED

COSTS

No costs.

[1] Even if we had jurisdiction, Robison does not argue that her case is distinguishable from *Haines* and *Crews*. *See* Robison Open. Br. 16. She asks only that the panel reverse that precedent but does not point us to any intervening decision. *Id.* at 5–8. We thus cannot do so, as we are "bound by the determinations of a prior panel, unless relieved of that obligation by an en banc order of the court or a decision of the Supreme Court." *See Deckers Corp. v. United States*, 752 F.3d 949, 959 (Fed. Cir. 2014).

APPENDIX D

Designated for electronic publication only

UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

No. 23-5922

LINDA KAY ROBISON,

Appellant,

v.

DENIS MCDONOUGH,
SECRETARY OF VETERANS AFFAIRS,

Appellee.

Before PIETSCH, *Judge*.

MEMORANDUM DECISION

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

PIETSCH, *Judge*: Appellant Linda Kay Robison appeals through counsel an August 25, 2023, Board of Veterans' Appeals (Board) decision that dismissed a claim of clear and unmistakable error (CUE) in a May 1999[1] rating decision that awarded non-service-connected pension benefits to Ms. Robison's spouse, veteran Gerald Glen Robison, and denied readjudi-

[1] Although the Board decision characterizes the rating decision as having been issued in June 1999, the record indicates that the decision was issued in May 1999. R. at 3081-82.

cation of Ms. Robison's August 2007 claim of entitlement to accrued benefits. *See* Record (R.) at 5-10. Single-judge disposition is appropriate in this case. *Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990).

For the reasons that follow, the Court affirms the part of the Board decision that dismissed Ms. Robison's CUE claim. Ms. Robison does not challenge the Board's denial of her request for readjudication of her August 2007 claim for accrued benefits; thus, the Court deems that issue abandoned and will dismiss the appeal as to that issue. *See Pederson v. McDonald*, 27 Vet.App. 276, 285 (2015) (en banc).

I. BACKGROUND AND ANALYSIS

Veteran Gerald Robison served in the Air Force from January 1962 to January 1966. R. at 2784. In January 1999, he submitted a VA Form 21-526, Veteran's Application for Compensation or Pension. R. at 3116-19. VA awarded non-service-connected pension benefits in a May 1999 decision. R. at 3081-82.

Mr. Robison died on June 22, 2007. R. at 2952. In August 2020, Ms. Robison, his surviving spouse, asserted CUE in the May 1999 rating decision that awarded pension benefits instead of service-connected compensation to Mr. Robison. R. at 95-98. In September 2020, VA denied Ms. Robison's motion to revise the May 1999 decision on the basis of CUE, R. at 52-54, and Ms. Robison appealed to the Board, R. at 51.

The Board issued the decision on appeal in August 2023, finding that because Ms. Robison was not the claimant in the May 1999 decision, she was without standing to file a CUE motion regarding it. R. at 7-8 (citing *Rusick v. Gibson*, 760 F.3d 1342, 1345-46

(Fed. Cir. 2014) (holding that survivors lack standing to request review of a decision affecting a veteran's disability benefits on the basis of CUE). Thus, the Board found, dismissal was warranted because Ms. Robison's claim was precluded as a matter of law.

On appeal to this Court, Ms. Robison acknowledges that in *Haines v. West*, 154 F.3d 1298, 1301 (Fed. Cir. 1998), *cert. denied*, 526 U.S. 1016 (1999), the Federal Circuit held that a surviving accrued-benefits claimant "cannot initiate a freestanding CUE claim . . . if the veteran had not already filed such a claim." Appellant's Brief (App. Br.) at 8-10. She also acknowledges the Federal Circuit's more recent decision in *Crews v. McDonough*, 63 F.4th 27, 41 (Fed. Cir. 2023), holding that a substituted claimant does not have standing to move for revision of a decision based on CUE if CUE was not previously raised by the veteran. App. Br. at 7-8. Ms. Robison argues that both *Crews* and *Haines* were wrongly decided, and candidly explains that she is making these arguments before this Court solely for the purpose of preserving them for appeal to the Federal Circuit. *Id*. at 3, 7-8, 15. She does not identify any error of fact or law in the Board's decision.

Ms. Robison concedes that this Court is bound by *Crews* and *Haines*. *Id*. at 3; *see also Bethea v. Derwinski*, 2 Vet.App. 252, 254 (1992) (holding that in rendering decisions, the Court is bound by precedent, which includes an "en banc decision of this Court, a decision of the United States Court of Appeals for the Federal Circuit . . . or a decision of the Supreme Court of the United States"). In light of this controlling precedent, the Court finds no error in the Board's determination that Ms. Robison lacks

standing to challenge the May 1999 rating decision on the basis of CUE.

II. CONCLUSION

After considering the parties' pleadings and reviewing the record, the Court AFFIRMS the part of the August 25, 2023, decision by the Board that dismissed Ms. Robison's claim of CUE in the May 1999 rating decision. The remainder of the appeal is DISMISSED.

DATED: October 22, 2024 Copies to:

Robert C. Brown, Jr., Esq. VA General Counsel (027)

APPENDIX E

BOARD OF VETERANS'APPEALS
FOR THE SECRETARY OF VETERANS AFFAIRS

XC XX XXX 533
Docket No. 200920-108821
Advanced on the Docket

IN THE APPEAL OF
LINDA KAY ROBISON

IN THE CASE OF
GERALD G. ROBISON

Appellant Represented by Robert C. Brown, Jr.

DATE: August 25, 2023

ORDER

The claim of clear and unmistakable error (CUE) in a June 1999 rating decision that assigned the Veteran nonservice-connected pension benefits is dismissed.

Readjudication of the claim for entitlement to accrued benefits is denied.

FINDINGS OF FACT

1. Under 38 U.S.C. § 5109A and 38 C.F.R. § 3.105(a), the appellant has neither a statutory nor regulatory basis which permits her to bring a freestanding claim alleging CUE in the June 1999

rating decision because she is not a "claimant" as contemplated under the statute or regulation.

2. An August 2007 rating decision awarded the appellant death pension benefits and denied accrued benefits. The appellant was notified of the decision but did not appeal.

3. The appellant did not submit, and the Department of Veterans Affairs (VA) has not received, evidence that existed at the time of the Veteran's death and was in VA's possession but was not associated with the claims file at the time of the August 2007 rating decision and which tends to prove or disprove a matter at issue regarding the claim for accrued benefits.

CONCLUSIONS OF LAW

1. As the appellant lacks standing to challenge the finality of the June 1999 rating decision, the Board has no jurisdiction to adjudicate the merits of the claim for revision of a decision based on CUE. 38 U.S.C. §§ 5109A, 7105; 38 C.F.R. §§ 3.105.

2. New and relevant evidence has not been presented or secured to warrant readjudication of the claim for entitlement to accrued benefits. 38 U.S.C. §§ 5108, 5121; 38 C.F.R. §§ 3.156, 3.2501.

REASONS AND BASES FOR FINDINGS AND CONCLUSIONS

The Veteran served on active duty in the United States Air Force from January 1962 to January 1966. He died in June 2007. The appellant is his surviving spouse.

This matter comes before the Board of Veterans' Appeals (Board) on appeal from a September 2020 decision of the Department of Veterans Affairs (VA)

Agency of Original Jurisdiction (AOJ). The Veteran timely appealed this decision to the Board by filing a Notice of Disagreement on VA Form 10182 in September 2020 requesting the Appeals Modernization Act (AMA) Direct Review option.

Therefore, the Board may only consider the evidence before the AOJ at the time of the decision on appeal.

I. Pertinent Facts

The Veteran was in receipt of non-service-connected pension benefits at the time of his death in June 2007. He was awarded the benefits in a June 1999 rating decision. In July 2007, the appellant filed VA Form 21-534, Application for Dependency and Indemnity Compensation (DIC), Death Pension and Accrued Benefits by a Surviving Spouse or Child.

In August 2007, the AOJ awarded the appellant death pension benefits and denied accrued benefits. In May 2020, the AOJ granted the appellant DIC benefits for the cause of the Veteran's death and eligibility to Dependents Educational Assistance benefits under 38 U.S.C.§3501, effective October 13, 2015 (date of claim on VA Form 21-4138, Statement in Support of Claim, to reopen service connection for DIC benefits). This date was later revised by the AOJ in a July 2020 Higher Level Review rating decision to April 9, 2010 (date of claim on VA Form 21-0820, Report of General Information, to reopen service connection for death/DIC benefits).

This appeal originates from the appellant's August 2020 supplemental claim for additional DIC benefits based on CUE in a January 1999 rating decision that granted the Veteran service connection for pension benefits, and for accrued benefits on the basis that

the AOJ failed to consider such benefits in the August 2007 rating decision.

II. Analysis

A. CUE

The appellant appeals a September 2020 AOJ decision that denied her additional DIC benefits on that basis that she was receiving the maximum allowable amount.

As noted, in her August 2020 supplemental claim for additional DIC benefits, the appellant, through her representative, asserted CUE in a June 1999 rating decision that awarded the Veteran nonservice-connected pension benefits. In this regard, the appellant asserts that the Veteran should have been awarded compensation benefits rather than pension benefits.

A review of the record shows that the Veteran did not appeal the June 1999 rating decision that awarded him nonservice-connected pension benefits nor did he ever seek to revise that decision based on CUE in his lifetime. Consequently, the appellant is not permitted to file a CUE motion as to that decision.

Section 5109A(c) specifies that a CUE challenge may be initiated only "on the Secretary's own motion or upon request of the claimant." Because the appellant was not "the claimant" involved in the June 1999 RO determination, she is not permitted under section 5109A to file a request for review of that decision based on CUE. *See Rusick v. Gibson*, 760 F.3d 1342, 1345-46 (Fed. Cir. 2014) (stating "that 'a survivor has no standing to request review of a decision affecting the disability benefits of a veteran on the ground of CUE'" (*quoting Haines v. West*, 154

F.3d 1298, 1301 (Fed. Cir. 1998)); *see also id*. at 1346 (clarifying that, notwithstanding the enactment of 38 U.S.C. § 5121A, which allows specified survivors to be substituted for the deceased VA claimant for accrued benefits purposes in cases where a claimant dies on or after October 10, 2008), "*Haines* still stands for the proposition that a survivor cannot initiate a freestanding CUE claim under section 5109A if the veteran had not already filed such a claim"); *cf*. 38 C.F.R. § 20.1400(a) ("Review to determine whether [CUE] exists in a final Board decision may be initiated by the Board, on its own motion, or by a party to that decision.".

As the law clearly prohibits a freestanding CUE claim under section 5109A if the Veteran had not already filed such a claim, the appellant's challenge is precluded as a matter of law. Accordingly, the Board must dismiss the appellant's appeal for her lack of standing to assert the June 1999 rating decision contains CUE. Since the law is dispositive in this case, the claim must be dismissed. *See Sabonis v. Brown*, 6 Vet. App. 426 (1994).

B. Accrued Benefits

The appellant asserts that her July 2007 claim for benefits on VA Form 21-534, Application for Dependency and Indemnity Compensation, Death Pension and Accrued Benefits by a Surviving Spouse or Child, that resulted in the August 2007 grant of nonservice connected death pension benefits, should have included consideration for accrued benefits.

Accrued benefits are defined as periodic monetary benefits authorized under a law administered by VA, to which a payee was entitled at death under existing ratings or decisions or those based on evidence in the

file at the date of death, and due and unpaid. 38 U.S.C. § 5121; 38 C.F.R. § 3.1000; *Zevalkink v. Brown*, 102 F.3d 1236 (Fed. Cir. 1996). For a claimant to prevail on an accrued benefits claim, the record must show that: (i) the individual has standing to file a claim for accrued benefits; (ii) the VA payee had a claim pending at the time of death; (iii) the VA payee would have prevailed on the claim if he or she had not died; and (iv) the claim for accrued benefits was filed within one year of the VA payee's death. 38 U.S.C. §§ 5101(a), 5121; 38 C.F.R. § 3.1000; *Jones v. West*, 136 F.3d 1299 (Fed. Cir. 1998).

Contrary to the appellant's assertion, the AOJ did consider the appellant's entitlement to accrued benefits in the August 2007 rating decision. In this regard, page two of the decision informed the appellant that there was no entitlement to accrued benefits because "there was no monetary benefit which was due but unpaid prior to the Veteran's death." No evidence pertinent to the claim was received within a year of this legacy decision and the appellant did not submit a notice of disagreement to that decision. As such, it became final. 38 C.F.R. § 3.160(d)(1).

The AMA allows for a request for re-adjudication of a previously denied claim if new and relevant evidence is presented or secured. 38 C.F.R. § 3.156(d). New evidence means existing evidence not previously submitted to agency decision makers. VA's regulations define relevant evidence as "evidence that tends to prove or disprove a matter in issue." 38 C.F.R. § 3.2501(a)(1).

The United States Court of Appeals for Veterans Claims (Court) in *Quattlebaum v. Shinseki*, 25 Vet. App. 171 (2012) clarified that, for petitions to reopen a previously denied claim for accrued benefits, the

analysis for whether reopening is warranted may only be based on this limited range of evidence that was in existence at the time of the veteran's death. The Court explained that, in the context of an accrued benefits claim, and pursuant to VA's definition of "evidence in the file at date of death" set forth in 38 C.F.R. § 3.1000(d)(4), there may be circumstances perhaps rare but certainly possible where documents are in the Secretary's possession at the date of the veteran's death (and therefore are considered to be in the file at the date of death) yet have never been presented to the Agency decisionmakers. *Quattlebaum*, 25 Vet. App. at 175. Any such document submitted to the decisionmaker subsequent to a denial of an accrued benefits claim would qualify as new evidence pursuant to 38 C.F.R. § 3.156(a), and might also be material if it, along with evidence previously in the record, relates to an unestablished fact necessary to substantiate the claim.

In this case, no such evidence has been received by VA. That is, there is no evidence pertaining to the accrued benefits claim that was in VA's possession on or before the Veteran's date of death that can be considered new and relevant evidence sufficient to reopen a claim for accrued benefits. Instead, the claims file only includes the appellant's assertions received after the death of the Veteran that the AOJ failed to consider entitlement to accrued benefits in August 2007. These statements clearly were not in VA's possession at the time of the Veteran's death. Moreover, as explained above, these statements are not correct since the AOJ did consider the appellant's entitlement to accrued benefits in August 2007.

Accordingly, the Board must conclude that new and relevant evidence to readjudicate the claim for service connection for accrued benefits has not been received. Therefore, readjudication of this claim is not warranted and is denied.

/s/ Kristin Haddock
Kristin Haddock
Veterans Law Judge
Board of Veterans' Appeals

Attorney for the Board A. Shawkey, Counsel.

The Board's decision in this case is binding only with respect to the instant matter decided. This decision is not precedential and does not establish VA policies or interpretations of general applicability. 38 C.F.R. § 20.1303.

APPENDIX F

38 U.S. Code § 5109A

§ 5109A. Revision of decisions on grounds of clear and unmistakable error

(a)

A decision by the Secretary under this chapter 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.

(b)

For the purposes of authorizing benefits, a rating or other adjudicative decision that constitutes a reversal or revision of a prior decision on the grounds of clear and unmistakable error has the same effect as if the decision had been made on the date of the prior decision.

(c)

Review to determine whether clear and unmistakable error exists in a case may be instituted by the Secretary on the Secretary's own motion or upon request of the claimant.

(d)

A request for revision of a decision of the Secretary based on clear and unmistakable error may be made at any time after that decision is made.

(e)

Such a request shall be submitted to the Secretary and shall be decided in the same manner as any other claim.

38 U.S. Code § 5121

§ 5121. Payment of certain accrued benefits upon death of a beneficiary

(a) Except as provided in sections 3329 and 3330 of title 31, periodic monetary benefits (other than insurance and servicemen's indemnity) under laws administered by the Secretary to which an individual was entitled at death under existing ratings or decisions or those based on evidence in the file at date of death (hereinafter in this section and section 5122 of this title referred to as "accrued benefits") and due and unpaid, shall, upon the death of such individual be paid as follows:

(1)

Upon the death of a person receiving an apportioned share of benefits payable to a veteran, all or any part of such benefits to the veteran or to any other dependent or dependents of the veteran, as may be determined by the Secretary.

(2) Upon the death of a veteran, to the living person first listed below:

(A)

The veteran's spouse.

(B)

The veteran's children (in equal shares).

(C)

The veteran's dependent parents (in equal shares).

(3)

Upon the death of a surviving spouse or remarried surviving spouse, to the children of the deceased veteran.

(4)

Upon the death of a child, to the surviving children of the veteran who are entitled to death compensation, dependency and indemnity compensation, or death pension.

(5)

Upon the death of a child claiming benefits under chapter 18 of this title, to the surviving parents.

(6)

In all other cases, only so much of the accrued benefits may be paid as may be necessary to reimburse the person who bore the expense of last sickness and burial.

(b)

No part of any accrued benefits shall be used to reimburse any political subdivision of the United States for expenses incurred in the last sickness or burial of any beneficiary.

(c)

Applications for accrued benefits must be filed within one year after the date of death. If a claimant's application is incomplete at the time it is originally submitted, the Secretary shall notify the claimant of the evidence necessary to complete the application. If such evidence is not received within one year from the date of such notification, no accrued benefits may be paid.