No. _____

In the Supreme Court of the United States

LADY LOUISE BYRON,
Petitioner,
v.

ERIC K. SHINSEKI, Secretary of Veterans Affairs,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Edward Reines
Counsel of Record
Nathan Greenblatt
Justin M. Lee
WEIL, GOTSHAL & MANGES LLP
201 Redwood Shores Pkwy.
Redwood Shores, CA 94065
(650) 802-3000
edward.reines@weil.com

Jeffrey G. Homrig
L. Okey Onyejekwe Jr.
KASOWITZ BENSON TORRES & FRIEDMAN LLP
101 California Street, Suite 2300
San Francisco, CA 94111
(415) 421-6140

COUNSEL FOR PETITIONER

QUESTIONS PRESENTED

In a decision that promotes needless bureaucratic delay for thousands of veterans, the Federal Circuit upheld the practice of the U.S. Court of Appeals for Veterans Claims (CAVC) to remand appeals even where the record is complete and there is no bona fide issue for remand. The Federal Circuit's new rule rejects the Futility Rule established in this Court in *NLRB v. Wyman-Gordon*, 394 U.S. 759 (1969) (plurality opinion), placing it squarely in conflict with eight other circuits. Further, the decision is directly contrary to the CAVC's jurisdictional statutes, this Court's precedent in *Henderson v. Shinseki*, 131 S. Ct. 1197 (2011), and the Veterans Benefits Act of 2002 which expressly overruled the chief authority upon which the Federal Circuit relied. The question presented is:

Whether the CAVC has the authority and responsibility to reverse a denial of benefits where the record is complete and there is no bona fide issue for remand and thus no agency discretion to exercise upon a remand?

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Lady Louise Byron ("Petitioner") respectfully petitions this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit.

INTRODUCTION

This petition stems from Lady Louise Byron's 41 year plus odyssey through the byzantine world of our dysfunctional veterans benefits system.[1] Reminiscent of Sisyphus, that journey has included 8 different appeals of a claim arising from her husband's death in 1971 as a result of radiation exposure in the early 1950s at nuclear tests in the Nevada desert. The legal error giving rise to this petition is a common one. The United States Court of Appeals for Veterans Claims (CAVC) concluded that the Board of Appeals for Veterans Claims has made another legal error, but refused to reverse the denial of benefits even though there is no bona fide issue for remand – placing Lady Byron's 41 year old claim back on the hamster wheel of the veterans system even though she is 80 years old and at the end of her life.

Although the CAVC readily agreed that the Board of Veterans' Appeals (BVA) below made a legal error in not considering overwhelming and

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[1] Ms. Byron's case was featured in a National Law Journal article by Marcia Coyle entitled "Veterans seek end to repeat remands," dated May 7, 2012. *See* Appendix E at 67a.

uncontested evidence that supported the conclusion her husband died at age 40 from the radiation to which he was exposed at military testing sites, the court refused to even evaluate whether a bona fide issue for remand existed, instead remanding back to the BVA again.

On review of the remand decision, the Federal Circuit summarily affirmed the CAVC decision, subsequently also denying rehearing *en banc*. In doing so, it rejected the Futility Rule established in this Court under *NLRB v. Wyman-Gordon,* 394 U.S. 759 (1969) (plurality opinion) and put the court in conflict with at least eight other circuits. This decision is furthermore directly contrary to the CAVC's jurisdictional statutes (which both grant the CAVC the power of reversal and require the CAVC to resolve cases in a timely manner), this Court's precedent in *Henderson v. Shinseki*, 131 S. Ct. 1197 (2011), and the Veterans Benefits Act of 2002, which explicitly overruled the chief authority upon which the Federal Circuit relied.

Petitioner seeks review by this Court to determine whether the CAVC has the authority and responsibility to reverse a denial of benefits in the lower court when the record is complete and there is no bona fide issue for remand and thus agency discretion to exercise. If granted, this petition has the potential to reduce massive judicial inefficiency and benefit thousands of deserving veterans whose claims have been needlessly delayed in a lengthy game of procedural ping-pong that has now been

blessed by the Federal Circuit as the standard operating procedure.

OPINIONS BELOW

The order of the United States Court of Appeals for the Federal Circuit, entered on February 17, 2012, is reported at 670 F.3d 1202 (Fed. Cir. 2012), and reprinted in the Appendix to this Petition (App.) at 1a (hereafter cited as Panel Op.). The memorandum order of the Court of Appeals for Veterans Claims, dated June 20, 2011, is reported at 2011 WL 2441683 (CAVC June 20, 2011), and reprinted at App. 8a. The memorandum order of the Board of Veterans' Appeals, dated December 11, 2009, is reported at *Lady Louise Byron* v. *Eric K. Shinseki, Sec'y of Veterans Affairs,* No. 04-30647 (Board Vet. App. Dec. 11, 2009), JA[2]268-96, and reprinted at App. 24a . The Federal Circuit's order denying Petitioner's petition for rehearing *en banc*, entered on June 19, 2012, is reprinted at App. 65a.

JURISDICTION

The United States Court of Appeals for the Federal Circuit entered judgment on February 17, 2012, affirming the lower court's June 20, 2011 decision. The Federal Circuit denied Petitioner's petition for rehearing *en banc* on June 19, 2012. The

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[2] Cites to "JA" herein refer to the Joint Appendix at the United States Court of Appeals for the Federal Circuit.

jurisdiction of this Court is therefore based on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves provisions of the United States Code. The pertinent provisions for purposes of this petition are 38 U.S.C. § 7252:

> **(a)** The Court of Appeals for Veterans Claims shall have exclusive jurisdiction to review decisions of the Board of Veterans' Appeals. The Secretary may not seek review of any such decision. The Court shall have power to affirm, modify, or reverse a decision of the Board or to remand the matter, as appropriate.
>
> **(b)** Review in the Court shall be on the record of proceedings before the Secretary and the Board. The extent of the review shall be limited to the scope provided in section 7261 of this title. The Court may not review the schedule of ratings for disabilities adopted under section 1155 of this title or any action of the Secretary in adopting or revising that schedule.

> **(c)** Decisions by the Court are subject to review as provided in section 7292 of this title.

and 38 U.S.C. § 7261:

> **(a)** In any action brought under this chapter, the Court of Appeals for Veterans Claims, to the extent necessary to its decision and when presented, shall—
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> > **(1)** decide all relevant questions of law, interpret constitutional, statutory, and regulatory provisions, and determine the meaning or applicability of the terms of an action of the Secretary;
> >
> > **(2)** compel action of the Secretary unlawfully withheld or unreasonably delayed;
> >
> > **(3)** hold unlawful and set aside decisions, findings (other than those described in clause (4) of this subsection), conclusions, rules, and regulations issued or adopted by the Secretary, the Board of Veterans' Appeals, or the Chairman of the Board found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or in violation of a statutory right; or

(D) without observance of procedure required by law; and

(4) 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.

(b) In making the determinations under subsection (a), the Court shall review the record of proceedings before the Secretary and the Board of

Veterans' Appeals pursuant to section 7252 (b) of this title and shall—

(1) take due account of the Secretary's application of section 5107 (b) of this title; and

(2) take due account of the rule of prejudicial error.

(c) In no event shall findings of fact made by the Secretary or the Board of Veterans' Appeals be subject to trial de novo by the Court.

(d) When a final decision of the Board of Veterans' Appeals is adverse to a party and the sole stated basis for such decision is the failure of the party to comply with any applicable regulation prescribed by the Secretary, the Court shall review only questions raised as to compliance with and the validity of the regulation.

This case also involves the Veterans Benefits Act of 2002 (VBA), Pub.L. No. 107-330, § 401, 116 Stat. 2820, 2832:

SEC. 401. STANDARD FOR REVERSAL BY COURT OF APPEALS FOR VETERANS CLAIMS OF ERRONEOUS FINDING OF FACT BY
BOARD OF VETERANS' APPEALS.

(a) STANDARD FOR REVERSAL.—Paragraph (4) of subsection (a) of section 7261 is amended—

(1) by inserting "adverse to the claimant" after "material fact"; and

(2) by inserting "or reverse" after "and set aside".

(b) REQUIREMENTS FOR REVIEW.—Subsection (b) of that section is amended to read as follows:

"(b) In making the determinations under subsection (a), the Court shall review the record of proceedings before the Secretary and the Board of Veterans' Appeals pursuant to section 7252(b) of this title and shall—

"(1) take due account of the Secretary's application of section 5107(b) of this title; and

"(2) take due account of the rule of prejudicial error.".

(c) APPLICABILITY.—(1) Except as provided in paragraph (2), the amendments made by this section shall take effect on the date of the enactment of this Act.

(2) The amendments made by this section shall apply with respect to any case pending for decision before the United States Court of Appeals for Veterans Claims other than a case

in which a decision has been entered before the date of the enactment of this Act.

STATEMENT OF THE CASE

Lady Byron seeks review of the decision of the Federal Circuit in *Lady Louise Byron* v. *Eric K. Shinseki, Sec'y of Veterans Affairs,* 670 F.3d 1202 (Fed. Cir. 2012) upholding the June 20, 2011 CAVC decision, which had previously failed to reverse the December 11, 2009 BVA decision and instead remanded the case for further proceedings.

Dennis Donald Acheson ("the Veteran"), husband of petitioner Lady Louise Byron, served on active duty in the United States Army from 1952 to 1954, followed by six years as a U.S. Army Air Defense Board physicist and mathematician. JA479. In 1953, the Veteran was assigned to the highly classified OPERATION UPSHOT-KNOTHOLE, where he was repeatedly exposed to ionizing nuclear radiation. JA314-17. In 1966, the Veteran began feeling very ill. JA311. In 1971, after multiple rounds of chemotherapy and radiation, the Veteran died August 30, 1971 from a rare form of cancer called Reticular Cell Sarcoma closely linked to radiation exposure. JA311-12. He was 42 years old. *Id.* Since then, five doctors have submitted opinions establishing that this cancer was caused by the Veteran's exposure to radiation during service.

JA55-57, 311-13. Nothing in the record contradicts their testimony.

A few days after the Veteran's death, Ms. Byron made a claim for benefits and dependency and indemnity compensation (DIC), and submitted new evidence to support the claim in 1996, after the Secretary of Defense lifted relevant secrecy regulations. JA289, 351-52, 356. In 2003, following two denials by the BVA and two remands after appeal, the BVA finally granted part of Ms. Byron's claim, setting an effective date of August 1995. JA27-28, 398-400, 425-31, 447-54. On appeal, the BVA first denied an earlier effective date, but following yet another remand from the CAVC, settled on an effective date of May 1988.

This BVA decision of December 11, 2009 at issue granted Ms. Byron entitlement to survivor benefits only on the basis of a statutory presumption of service connection for the death of her husband. *Lady Louise Byron* v. *Eric K. Shinseki, Secretary of Veterans Affairs,* No. 04-30647 (Board Vet. App. Dec. 11, 2009), JA268-96. Committing what is an acknowledged and uncontested legal error, the BVA failed to acknowledge the overwhelming and uncontested evidence that supported a direct (as opposed to presumptive) service connection, which would have granted Ms. Byron the earlier effective date of 1971 for DIC benefits.

On appeal of this decision, the CAVC readily agreed that it was legal error for the BVA to have

failed to consider Ms. Byron's evidence in support of a direct service connection. *Lady Louise Byron* v. *Eric K. Shinseki, Sec'y of Veterans Affairs*, 2011 WL 2441683 at *6 (CAVC June 20, 2011). However, the CAVC held that because the BVA had not considered the evidence that the cause of death was radiation exposure, "reversal is ***precluded*** as a remedy." JA9-10. In the face of Lady Byron's argument that there was no more basis for delay because the record was complete and uniform that benefits were statutorily required, the CAVC refused to review the record to even attempt to determine if there was a bona fide issue for remand, *i.e.* whether the uncontested evidence in the record uniformly supposed an award of benefits. The CAVC held that it was bound by the Federal Circuit precedent of *Hensley v. West*, 212 F.3d 1255 (Fed. Cir. 2000), and therefore vacated and remanded. JA10. The CAVC ignored Ms. Byron's argument that denial of benefits violated 38 U.S.C. § 7261(a)(2) as "action unlawfully withheld or unreasonably delayed."

Upon further appeal, the Federal Circuit affirmed, holding that even if the evidence was overwhelming, the BVA itself "must still make an initial determination of whether Ms. Byron has sufficiently supported a claim for DIC with an earlier effective date." Panel Op. at 6. Relying only on the government's unsupported say-so that the record **might** be capable of supporting more than one conclusion, the Federal Circuit concluded that the appropriate remedy was remand because the CAVC is barred from evaluating the record to

determine if a bona fide issue exists. Like the CAVC, the Federal Circuit ignored Ms. Byron's argument under 38 U.S.C. § 7261(a)(2). The Federal Circuit denied rehearing *en banc* on June 19, 2012.

Ms. Byron's claim has been pending in the judicial system for over 41 years, having been considered no fewer than eleven times without resolution—three times at the BVA level and eight times at the appellate level—during over 15 years of active litigation. As detailed below, the Federal Circuit's decision exacerbates the waste and delay in this system contrary to this Court's authority, statute, and all common sense regarding how the veterans system should operate. Applying law and logic would vastly improve the system by removing senseless delay at no cost to anyone.

REASONS FOR GRANTING THE PETITION

It is fundamental under the Futility Rule established in this Court in *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969) (plurality opinion), and reaffirmed in *Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cnty.*, 554 U.S. 527, 545 (2008), that courts of appeals are not required to remand a case to an agency where remand would be futile: "To remand would be an idle and useless formality. *Chenery* does not require that we convert judicial review of agency action into a ping-pong game." *NLRB*, 394 U.S. at 766 n.6. Other circuits have applied the rule to hold that even if an agency below did not pass on an underlying factual

issue, the appellate courts reviewing the agency findings have the power to reverse where remand would be futile because there is no agency discretion to apply. This case, where the record is complete and there is no bona fide issue for remand, is a paradigm of one in which remand to the agency would be futile and further prolong an aged claim that has been wrongly denied an outrageous number of times already. In upholding the remand order of the CAVC, the Federal Court rejected the Futility Rule, in conflict with this Court's holdings and the decisions of at least eight other circuits.

Beyond that, the Federal Circuit's decision is directly contrary to the statutes governing the CAVC. Statutes grant the CAVC the power to reverse and compel the CAVC to resolve cases without unreasonable delay. Despite that, the Federal Circuit required a time-consuming, needless remand where the fully developed factual record supports only one straightforward outcome. This decision promotes only bureaucracy, not justice. Furthermore, the decision below contradicts the Veterans Benefits Act of 2002 and this Court's precedent in *Henderson v. Shineski*, 131 S. Ct. 1197 (2011), both of which emphasized the unique, pro-claimant nature of the veterans system. *Henderson* further applied the canon that provisions for veterans benefits are to be construed in the veteran's favor. In holding that the CAVC had no power or obligation to reverse where remand would be futile—despite statutes that dictate both—the Federal Circuit rejected *Henderson*'s teachings.

Thousands of U.S. Armed Services Veterans and their survivors would directly benefit from Supreme Court review. Close to 5000 new appeals are filed with the CAVC every year, with the majority of these cases remanded back to the BVA. Many of these cases can benefit from a direct entry of judgment, saving veterans years of unnecessary litigation. Furthermore, the judiciary charged with administering this nation's veterans' benefits systems would also benefit from review. The veterans benefits system is notorious for its backlog, a problem only increasing with 10,000 veterans of the armed conflicts of Iraq and Afghanistan entering the system per month. Affirming the CAVC's statutory power to reverse rather than order futile remands would do much to reduce this backlog. Accordingly, further review by this Court is warranted to resolve this inefficiency in the judicial system, resurrect the statutory power of the CAVC, and reconcile the Federal Circuit with the decisions of this Court and of at least eight other circuits.

I. THE FEDERAL CIRCUIT'S REJECTION OF THE FUTILITY RULE ANNOUNCED IN NLRB V. WYMAN-GORDON CONFLICTS WITH THE DECISIONS OF EIGHT OTHER CIRCUITS

The Federal Circuit decision below rejected the Futility Rule established by this Court, and applied by at least eight other circuits.

A. The Federal Circuit Rejected The Futility Rule In Remanding A Case Where The Record Is Complete And There Is No Issue For Remand

The Futility Rule provides that courts may reverse an agency decision rather than remand, if remand would be futile. *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 766 n.6 (1969) (plurality opinion) (holding that courts are not required to convert judicial review of agency action into a ping-pong game). Here, the Federal Circuit failed to *consider*—or allow the CAVC to *consider*—whether remand would be futile. Instead, it endorsed the CAVC's decision that "reversal is precluded as a remedy." *Lady Louise Byron* v. *Eric K. Shinseki, Secretary of Veterans Affairs*, 2011 WL 2441683 at *6 (CAVC June 20, 2011). It did so even though the record is complete and the evidence uniformly and indisputably supports an award of benefits: No evidence in the record contradicts the testimony of five doctors, all testifying that the veteran died of cancer he contracted during service. It did so even

though Ms. Byron repeatedly brought the Futility Rule to the court's attention. *See* Br. for Appellant at 25, *Byron v. Shinseki*, No. 2011-7170 (Fed. Cir. Aug. 3, 2011); Br. for Claimant-Appellant at 5, No. 2011-7170 (Fed. Cir. April 2, 2012). Ignoring Ms. Byron's arguments, the court opinions make no comment on the futility of remand. The decision below therefore represents a direct and outright rejection of the Futility Rule as established in this Court.

Furthermore, by improperly relying only on the government's mere say-so (without a hint of evidentiary support) that a remand was required, the Federal Circuit contorts the Futility Rule. The court found that because the government merely **asserted** that the record **might** be capable of supporting more than one conclusion, the only appropriate remedy was remand. *See* Br. for Respondent-Appellee Eric K. Shinseki at 28-32 (stating that "[t]he Secretary does not concede the record is capable of supporting only one conclusion," but at the same time refusing to "affirmatively challenge [the] medical evidence of record"). A court's determination of futility, however, cannot turn so capriciously on one party's say-so. *See e.g., Borzych v. Frank,* 439 F.3d 388, 390 (7th Cir. 2006) ("unreasoned say-so . . . is insufficient to create a material dispute"); *First Heights Bank, FSB v. U.S.,* 422 F.3d 1311, 1316 (Fed. Cir. 2005) (A "mere assertion . . . does not raise a triable issue of fact."). Allowing a court to do so would lay precarious foundations for the entire judicial system. The Federal Circuit's endorsement of the CAVC's refusal

to even consider the futility of remand should therefore be corrected.

B. The Futility Rule Is Well-Established In NLRB And Applied By At Least Eight Circuits

The Futility Rule is well-established and has been applied by at least eight other circuits. This Court established the Futility Rule in *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969) (plurality opinion), holding that courts of appeal are not required to remand a case to an agency where remand would be futile: "To remand would be an idle and useless formality. *Chenery* does not require that we convert judicial review of agency action into a ping-pong game." *Id.* at 766 n.6. The Court reaffirmed this holding in *Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cnty.*, 554 U.S. 527, 545 (2008).

The Futility Rule has been applied by at least eight other circuits—including the First, Second, Fourth, Sixth, Ninth, Tenth, Eleventh, and D.C. Circuits.[3] These courts have authorized appellate

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[3] *See, e.g.*, *Watson v. Geren*, 569 F.3d 115, 129 (2d Cir. 2009) (affirming district court's reversal of agency's denial of relief because remand would be futile); *Krauss v. Oxford Health Plans, Inc.*, 517 F. 3d 614, 630 (2d Cir. 2008) (refusing to remand because it "would be futile"); *Xiao Ji Chen v. U.S. Dept. of Justice*, 471 F.3d 315, 339 (2d Cir. 2006) (applying the Futility Rule when a court "can confidently predict that the agency would reach the same decision absent the errors.");

courts to reverse an agency's denial of benefits rather than remand, if remand would be futile. For example, in *Felisky*, the Sixth Circuit reversed an agency decision and directed an award benefits because "all essential factual issues have been

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Hussain v. Gonzales, 477 F.3d 153, 157-58 (4th Cir. 2007) (same); *Moisa v. Barnhart,* 367 F.3d 882 (9th Cir. 2004) (reversing agency decision with instructions to award benefits where no other conclusion could lawfully be drawn from the evidence); *Holohan v. Massanari,* 246 F.3d 1195, 1120 (9th Cir. 2001) ("[A] remand for further proceedings is unnecessary if the record is fully developed and it is clear from the record that the ALK would be required to award benefits."); *Sierra Club v. USEPA,* 346 F.3d 955, 963 (9th Cir. 2003) (refusing to remand because "there is simply no possibility" that the facts could support a different conclusion); *Seavey v. Barnhart,* 276 F.3d 1,11-12 (lst Cir. 2001) (collecting cases); *Felisky v. Bowen,* 35 F.3d 1027, 1041 (6th Cir. 1994) (directing award of benefits where evidence strongly favored claimant and "there is no significant evidence to the contrary," even though ALJ did not evaluate all the factors required by statute); *Nielson v. Sullivan,* 992 F.2d 1118, 1121-22 (10th Cir. 1993) (directing award of benefits despite failure of agency to make required factual findings); *George Hyman Constr. Co. v. Brooks,* 963 F.2d 1532, 1539 (D.C. Cir. 1992) (holding that "remand would indeed be futile" because "no rational factfinder conscientiously. . . could find" otherwise); *Mowrey v. Heckler,* 771 F.2d 966, 973 (6th Cir. 1985) ("[W]here there is an adequate record, the Secretary's decision denying benefits can be reversed... [if] proof of disability is strong and evidence to the contrary is lacking."); *Vista Hill Found., Inc. v. Heckler,* 767 F.2d 556, 566 n.9 (9th Cir. 1985) (judicial ping-pong not required); *Davis v. Shalala,* F.2d 528, 534 (11th Cir. 1993) ("This court . . . [may] remand the case for an entry of an order awarding disability benefits where the Secretary has already considered the essential evidence and it is clear that the cumulative effect of the evidence establishes disability without any doubt.").

resolved and the record adequately established a plaintiff's entitlement to benefits." *Felisky v. Bowen*, 35 F.3d 1027, 1041 (6th Cir. 1994). The court held so even though the agency "did not discuss [seven] factors [required to be considered by statute] and how they relate to the evidence in this case." *Id.* at 1039-41. Similarly, in *Hussain*, the Fourth Circuit held that even though the agency had not made a first determination due to procedural error, remand would be a "mere formality" because there were not enough facts to support Hussain's case—which the court classified as a "legal conclusion." *Hussain v. Gonzales*, 477 F.3d 153, 157-58 (4th Cir. 2007).

Ms. Byron's case is no different from *Felisky* and *Hussain*. That the BVA below had not explicitly reviewed the factual evidence beforehand should not impact the CAVC's power to apply the Futility Rule. Other circuits have demonstrated that even if an agency had not passed on an underlying factual issue, the appellate courts reviewing agency findings have the power to reverse where remand would be futile. The CAVC should exercise this power and reverse.

II. THE FEDERAL CIRCUIT'S REJECTION OF THE FUTILITY RULE IS DIRECTLY CONTRARY TO STATUTE

Not only is the Federal Circuit's decision contrary to the Futility Rule, it is also a rejection of the CAVC's jurisdictional statutes. Furthermore, the decision below relied chiefly on a case that has been

explicitly overruled by Congress and on inapplicable immigration case law.

A. The Jurisdictional Statute Grants The CAVC The Power To Reverse

The CAVC has the power to reverse the BVA. The statute defining the jurisdiction and power of the CAVC states that the CAVC "shall have power to affirm, modify, **or reverse** a decision of the [BVA] or to remand the matter, as appropriate." 38 U.S.C. § 7252(a). In addition to this specific power of reversal, 28 U.S.C. § 2106 gives appellate courts broad powers of determination, including the power to reverse where there is only one outcome as a matter of law:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

The Supreme Court has reiterated that this "statutory grant of appellate jurisdiction to the courts of appeals is certainly broad enough to include the power to direct entry of judgment." *Neely* v. *Martin K. Eby Constr. Co.,* 386 U.S. 317 (1967); *see also Weisgram* v. *Marley Co.,* 528 U.S. 440, 454

(2000) ("[T]he authority of courts of appeal to direct the entry of judgment as a matter of law extends to cases in which, on excision of testimony erroneously admitted, there remains insufficient evidence to support the jury's verdict.").

Furthermore, Congress has reinforced the CAVC's power and duty to reverse by specifically adding it to yet another of the CAVC's jurisdictional statutes. *See* Veterans Benefits Act of 2002 (VBA), Pub.L. No. 107-330, § 401, 116 Stat. 2820, 2832 (inserting "or reverse" after "and set aside" in 38 U.S.C. § 7261(a)(4)). Consistent with the underlying policy of the Futility Rule, Congress amended the statute in 2002 to "provide for more searching appellate review of BVA decisions" to "emphasize" that reversal is available and to "specifically require[]" the CAVC to review the complete factual record. 148 CONG. REC. S11334; 38 U.S.C. § 7261(b) ("the [CAVC] ***shall review*** the record of proceedings before the Secretary and the Board of Veterans' Appeals") (emphasis added).

Here, the Federal Circuit erred by prohibiting the CAVC from reviewing the record to determine if there was a bona fide issue for remand and the exercise of agency discretion. By its plain language, the statute contains no exception on the CAVC's duty to review the record to determine if reversal rather than remand is proper, simply because the BVA failed to address an issue in the first instance due to legal error. Reading such an exception into the statute was error.

The Federal Circuit also erred by extending the limited prohibition on *de novo* review of 38 U.S.C. § 7261(c) to swallow the CAVC's broad power of reversal. The court emphasized language from § 7261(c) stating that "[i]n no event shall findings of fact made by the Secretary or the Board of Veterans' Appeals be subject to trial de novo by the [Veterans Court]." Panel Op. at 4-5. The court then reasoned that because "this is [] not a case where the agency analyzed the issue in the first instance," the CAVC must remand. Panel Op. at 5. But Ms. Byron did not ask the CAVC to find facts de novo, only that the court examine the record to determine the futility of remand. By inappropriately extending § 7261(c) to prohibit even this review of the facts, the Federal Circuit limits the power of reversal granted by § 7252(a) and reinforced by the Veterans Benefits Act of 2002.

B. The CAVC Has A Statutory Obligation To Compel Action Of The Secretary Unlawfully Withheld Or Unreasonably Delayed

Not only does the CAVC have the power to reverse, it also has a statutory *obligation* to resolve cases in a timely manner. The CAVC has the duty "to the extent necessary to its decision and when presented . . . [to] compel action of the Secretary unlawfully withheld or unreasonably delayed." 38 U.S.C. § 7261(a)(2).

In the decision below, the Federal Circuit rendered this statute null. As her case progressed through the courts, Ms. Byron repeatedly raised the statute at every opportunity: first before the CAVC; then before the Federal Circuit; and finally in the petition for rehearing *en banc*. *See* Br. for Appellant at 19, 2011 WL 2441683 (CAVC June 20, 2011); Br. for Appellant at 16, Byron v. Shinseki, No. 2011-7170 (Fed. Cir. Aug. 3, 2011); Br. for Claimant-Appellant at 9, No. 2011-7170 (Fed. Cir. April 2, 2012). Her pleas, however, went unheeded. None of the court opinions below considered the inefficiency of remand or even acknowledged the existence of 38 U.S.C. § 7261(a)(2). Refusing to consider reversal under the Futility Rule in a case that has been caught up by secrecy laws and procedural delay for 40 years is the epitome of unreasonable delay. In ignoring Ms. Byron's repeated arguments, the Federal Circuit effectively nullified an important provision of the CAVC jurisdictional statutes.

C. The Federal Circuit Erred By Failing To Interpret The CAVC Jurisdictional Statutes According To This Court's Precedent In Henderson

In upholding the CAVC's remand decision, the Federal Circuit failed to recognize the unique pro-claimant nature of the veteran system. The Supreme Court has "long applied the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor." *Henderson*, 131 S. Ct. at 1206 (internal quotations omitted). In

Henderson, the Court further stated that the "VA's adjudicatory process is designed to function throughout with a high degree of informality and solicitude for the claimant." 131 S. Ct. 1197, 1200 (2011) (internal citation omitted); *see also id.* at 1204 ("Congress has made clear that the VA is not an ordinary agency."); *id.* at 1205 ("The solicitude of Congress for veterans is of long standing.").

The canon highlighted in *Henderson* was reinforced by Congress in 2002. Emphasizing the pro-claimant nature of veterans law, Congress added a provision to the CAVC's jurisdictional statutes directing the CAVC to give the claimant the benefit of the doubt. Veterans Benefits Act of 2002 (VBA), Pub.L. No. 107-330, § 401, 116 Stat. 2820, 283; *see also Gilbert v. Derwinski,* 1 Vet. App. 49, 54-55 (1990).

Yet, the Federal Circuit failed to interpret the CAVC jurisdictional statutes in a favorable manner to the claimant. Even though 38 U.S.C. § 7252(a) specifically authorizes the CAVC to reverse instead of remand, the court did not even consider the futility of remand. Even though 38 U.S.C. § 7261(a)(2) specifically requires the CAVC to compel unreasonably delayed action of the Secretary, the court refused to consider the inefficiency of remand. Instead, the court employed the flawed reasoning that because it was not positioned "to review challenges to factual determinations . . . remand is the proper course." Panel Op. at 4-6. As discussed above, this reasoning is a rejection of the Futility

Rule and will result in needless delay for Ms. Byron and similarly situated beneficiaries. Interpreting provisions for benefits to members of the Armed Services to require such needless delay is obviously not in the beneficiaries' favor. The Federal Circuit's refusal to properly apply—or even consider—this Court's long-established precedent of *Henderson* should be corrected.

D. The Federal Circuit Erred By Relying Chiefly On A Case That Has Been Overruled By Statute

Disregarding the jurisdictional statutes of the CAVC, the Federal Circuit instead erroneously relied on *Hensley v. West*, 212 F.3d 1255 (Fed. Cir. 2000). First, the court cited *Hensley* as controlling. Referring to whether the CAVC must remand, the court stated "[w]e resolved this issue in *Hensley v. West,* where we held that when the Board misinterprets the law and fails to make the relevant initial factual findings, 'the proper course for the Court of Appeals for Veterans Claims [is] to remand the case to the [Board] for further development and application of the correct law.'" Panel Op. at 4. The court further emphasized that "appellate tribunals are not appropriate fora for initial fact finding." *Hensley*, 212 F.3d at 1264.

Hensley, however, does not control. In *Hensley*, the court ordered a remand because the CAVC in that case "took it upon itself to review 'de novo' the BVA's determination . . . by dissecting the

factual record in minute detail." 212 F.3d at 1264. Thus, *Hensley* reversed the CAVC because it failed to evaluate the record under the proper deferential standard. In contrast, this case did not ask the CAVC to review facts de novo. Rather, Ms. Byron asked the CAVC to determine the futility of remand, where there is only one legally permissible view of the evidence on a complete record. In blurring the distinction between this case and *Hensley*, the court below erroneously extended *Hensley* and crippled the CAVC's statutory power.

The court's reliance on *Hensley* was further improper because *Hensley* was overruled by the Veterans Benefits Act of 2002. Remarking on the statute, Senator Rockefeller specifically noted that the Act "**would overrule**" *Hensley*:

> The combination of these changes is intended to provide for more searching appellate review of BVA decisions, and thus give full force to the "benefit of doubt" provision. The addition of the words "or reverse" after "and set aside" in section 7261(a)(4) is intended to emphasize that CAVC should reverse clearly erroneous findings when appropriate, rather than remand the case. *This new language in section 7261 would overrule the recent U.S. Court of Appeals for the Federal Circuit decision of* Hensley v. West, *212 F.3d 1255 (Fed. Cir. 2000), which emphasized that*

> *CAVC should perform only limited, deferential review of BVA decisions,* and stated that BVA fact-finding "is entitled on review to substantial deference." However, nothing in this new language is inconsistent with the existing section 7261(c), which precludes the court from conducting trial de novo when reviewing BVA decisions, that is, receiving evidence that is not part of the record before BVA.

148 CONG. REC. S1132. *See also id.* at S1137; *Wells v. Principi,* Vet. App. No. 03-1014 at 1-18 (May 11, 2004) (Steinberg, J. dissenting from denial of initial consideration en banc, and concluding that *Hensley* has been overruled).

Thus, the court's reliance on *Hensley* to enforce limited review of BVA decisions runs directly contrary to Congress's intent. Instead of "provid[ing] for more searching appellate review of BVA decisions," the court perpetuates limited deferential review. This extension and endorsement of *Hensley* should be corrected.

E. The Federal Circuit Erred By Misinterpreting This Court's Precedent In Immigration Law

Not only did the Federal Circuit rely erroneously on *Hensley*, it also misinterpreted language in two immigration cases: *Gonzales v.*

Thomas, 547 U.S. 183 (2006) and *INS v. Ventura,* 537 U.S. 12 (2002). The court cited *Gonzales* and *INS* for the proposition that "when an agency has not made an initial determination, 'the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.'" Panel Op. at 5. The court further emphasized the rarity of the circumstances in which reversal may be proper: "It is not enough that only a few factual findings remain or that the applicant may have a strong case on the merits." *Id.*

This language in *Thomas* and *Ventura* is consistent with Ms. Byron's case, but it was badly misinterpreted by the Federal Circuit. The case here, where there is only one legally permissible view of the evidence and remand is futile, **should indeed be rare**. The First Circuit recognized this in *Seavey,* finding that it is an "unusual case" where "the underlying facts and law are such that the agency has no discretion to act in any manner other than to award or to deny benefits." 276 F.3d at 11. But in such an unusual case, "if the evidence and law compelled one conclusion or the other, then the [appellate] court could order an award of benefits or affirm a denial of benefits." *Id.*

Rather, *Thomas* and *Ventura* are distinguishable from this case, because they merely reiterate the established rule that appellate courts cannot engage in de novo fact-finding—a rule that is fully consistent with the jurisdictional statutes of the CAVC. *See* 148 Cong. Rec. S11334 ("Nothing in this

new language is inconsistent with . . . 7261(c)."). For example, in *Ventura*, the Supreme Court found "the basic record evidence . . . is, at most, ambiguous about the matter." *See Ventura,* 537 U.S. at 17.[4] However, in citing *Thomas* and *Ventura* as precedent, the Federal Circuit misclassified the issue in this case. The court mistakenly stated "this case does not 'involve[] a legal question, as opposed to the factual questions that were at issue in *Ventura* and *Thomas.*'" Panel Op. at 5. But futility of remand is a legal issue, and Ms. Byron's case, unlike *Ventura* and *Thomas*, does not ask the court to review extensive factual issues. In misapplying the immigration cases, the Federal Circuit mischaracterized the issue and discounted the jurisdictional statutes of the CAVC.

III. THIS CASE INVOLVES A RECURRING ISSUE OF GREAT IMPORTANCE

Review of the Federal Circuit's decision has the potential to benefit thousands of veterans and the judiciary.

A. Thousands Of Veterans And The CAVC Would Benefit From A Clear Construction Of The Futility Rule

[4] Furthermore, *Ventura* relied on *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947), for its holding, a case that *NLRB expressly* distinguished based on the exact factual grounds at issue in this case: whether the record permits one or more than one outcome.

Many thousands of U.S. Armed Services Veterans and their survivors would benefit directly from Supreme Court review. Close to 5000 new appeals are filed with the CAVC every year, with a majority of these cases remanded back to the BVA.[5] Many of these cases could benefit from a direct entry of judgment, saving veterans years of unnecessary litigation at both the trial and appellate level.

As a court plagued by backlog, the CAVC would also benefit from a clear construction of the Futility Rule. The caseload at the CAVC has doubled in recent years, with the court deciding over 600 cases per judge every year—a number that dwarfs other federal appellate courts.[6] Judges are working nights and weekends, but still say they have "difficulty keeping pace." *Id.* This number shows no signs of diminishing. 10,000 new war veterans enter the overburdened veterans system each month from the Iraq and Afghanistan wars alone.[7] In 2009 alone,

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[5] H.R. 110-789, 110th Cong. (Veterans Disability Benefits Claims Modernization Act Of 2008) ("The majority of the cases decided are remanded back to the Board. This has seemed to impact the effectiveness of the CAVC in providing intermediate res judicata and the result is often an overly elongated appeals process for veterans' claims.").

[6] *See* Jerry Markon, *'Veterans Court' Faces a Backlog That Continues to Grow*, THE WASHINGTON POST, Apr. 22, 2011, *available at* http://www.washingtonpost.com/politics/veterans-court-faces-backlog-that-continues-to-grow/2011/04/15/AFFaavRE_story.html.

[7] *See* Jamie Reno, *Court Rejects Iraq and Afghanistan Veterans' Demand for Better VA Care*, The Daily Beast, May 9, 2012,

4,725 new appeals were filed at the CAVC, adding to the many thousands of already backlogged cases. *See id.* According to a recent report released by the VBA, over a quarter million appealed cases are currently pending in the system. *See* United States Department of Veterans Affairs, *2012 Monday Morning Workload Reports, Jul. 23, 2012 Report.*

The CAVC adds to this backlog of cases by remanding many appeals inappropriately. Leading academics claim that "the CAVC has exhibited excessive tolerance for VA delay and error by failing to interpret its powers and the VA's mandate in ways that could speed decision-making and improve its accuracy." Richard E. Levy & Sidney A. Shapiro, *Government Benefits and the Rule of Law: Toward a Standards-Based Theory of Judicial Review*, 58 ADMIN L. REV. 499, 549 (2006). Veteran advocates argue that the CAVC is afraid of reversing decisions of the lower court. *Performance and Structure of the United States Court of Appeals for Veterans Claims: Hearing Before the S. Comm. On Veterans' Affairs*, 110th Cong. (Nov. 7, 2007) (statement of Richard Paul Cohen, President of the national Organization of Veterans Advocates) ("NOVA believes that there has been resistence [sic] to reversal of Board decisions by the Court."). Advocacy organizations

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available at http://www.thedailybeast.com/articles/2012/05/09/court-rejects-iraq-afghanistan-veterans-demand-for-better-va-care.html; Jim Davis, 3 Veterans-For-Change Newsletter 36, Sept. 2, 2012 at 2 (citing a "48% increase over 2010 claims with an estimated 10,000 new claims per month coming in.").

almost unanimously agree that the system takes too long to finally resolve cases. *See, e.g.*, William F. Fox, Jr., *Deconstructing and Reconstructing the Veterans Benefits System*, 13 KAN. J.L. & PUB. POL'Y 339 (2004); Reynolds Holding, *Insult to Injury*, 2005-APR LEGAL AFF. 26 (2005); James T. O'Reilly, *Burying Caesar: Replacement of the Veterans Appeals Process is Needed to Provide Fairness to Claimants*, 53 ADMIN. L. REV. 223 (2001).

Without clear direction from this Court about the Futility Rule as it applies in the Federal Circuit, these cases will continue to be decided in a grossly inefficient manner, with veterans waiting needlessly for resolution.

IV. CONCLUSION

For these reasons, the petition for writ of certiorari should be granted.

Dated: September 17, 2012

Respectfully submitted,

EDWARD REINES
NATHAN GREENBLATT
JUSTIN M. LEE
WEIL, GOTSHAL & MANGES LLP
201 Redwood Shores Parkway
Redwood Shores, CA

(650) 802-3100 Fax

JEFFREY G. HOMRIG
L. OKEY ONYEJEKWE JR.
KASOWITZ BENSON TORRES & FRIEDMAN LLP
101 CALIFORNIA STREET, SUITE 2300
SAN FRANCISCO, CA 94111
(415) 421-6140

COUNSEL FOR PETITIONER

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 2011-7170

LADY LOUISE BYRON,
Claimant-Appellant,

v.

ERIC K. SHINSEKI, SECRETARY OF VETERANS AFFAIRS
Respondent-Appellee.

[Argued and Submitted November 8, 2011
Filed: February 17, 2012]

Before NEWMAN, BRYSON, and MOORE, Circuit Judges.

MOORE, Circuit Judge.

Ms. Lady Louise Byron appeals from a decision by the Court of Appeals for Veterans Claims (Veterans Court) remanding the case for further proceedings before the Board of Veterans' Appeals (Board). *Byron v. Shinseki*, No. 09-4634, slip op., 2011 WL 2441683 (Ct. Vet. App. June 20, 2011). Because the Veterans Court properly remanded to the Board to make factual determinations in the first instance, we *affirm*.

BACKGROUND

This case arises from the Board's decision denying an earlier effective date of service connection for the cause of the death of Ms. Byron's husband, a veteran. Ms. Byron alleged that her husband developed cancer due to exposure to radiation while he was serving on active duty. Based on regulations that presume causation for certain diseases, the Board awarded service connection with an effective date of May 1, 1988. The Board did not determine whether Ms. Byron established a direct service connection that was not based on the presumptions. On appeal to the Veterans Court, the parties agreed that the Board should have made such a determination because it may entitle Ms. Byron to an earlier effective date. Ms. Byron sought for the Veterans Court to reverse the Board's decision rather than vacate and remand it. Because the Board did not consider the evidence or make factual findings concerning direct service connection, the Veterans Court remanded the case to

the Board to make such findings in the first instance. *Byron*, slip. op. at 8-9. Ms. Byron now appeals the decision to remand.

DISCUSSION

Remand orders of the Veterans Court are normally not reviewable, *Adams v. Principi*, 256 F.3d 1318, 1320 (Fed. Cir. 2001), but we have recognized exceptions to that rule. In *Adams*, a case very similar to this one, we held that a remand order was appealable because the issue pressed by the appellant was that he had a legal right not to be required to undergo a remand. In light of that decision and our subsequent decision in *Williams v. Principi*, 275 F.3d 1361, 1364 (Fed. Cir. 2002), in which we set forth a three-part test to identify the class of cases in which remand orders are directly appealable, we hold that it is appropriate to review the remand order in this case. This case satisfies that three-part test because the Veterans Court's decision was a clear and final decision of the legal issue presented by Ms. Byron; the resolution of that issue against Ms. Byron will be adverse to her by forcing her to submit to a remand; and the remand will effectively moot Ms. Byron's claim that she has a legal right to a decision of her claim without the need for a remand. Following *Adams* and *Williams*, we have delineated the circumstances where review of a remand order is proper. *See, e.g.*, *Joyce v. Nicholson*, 443 F.3d 845, 850 (Fed. Cir. 2006) (holding that we may not review a remand order

when the appellant is challenging the correctness of the analysis in the remand order); *Myore v. Principi*, 323 F.3d 1347, 1351-52 (Fed. Cir. 2003) (same); *Stevens v. Principi*, 289 F.3d 814, 817 (Fed. Cir. 2002) (holding that we may review a remand order to determine the Veterans Court's authority to order a remand). This case involves the same type of issue present in *Adams* and *Stevens*, whether the Veterans Court has the authority to reverse the Board rather than remand the case. Unlike the issues in *Joyce* and *Myore*, the issue of whether the Veterans Court has authority to reverse would become moot once the case is remanded. Thus, this is one of the rare circumstances where review of a remand order is proper.

The scope of our review of a Veterans Court decision is limited by statute. *See* 38 U.S.C. § 7292 (2006). Absent a constitutional issue, we may not review challenges to factual determinations or challenges to the application of a law or regulation to facts. 38 U.S.C. § 7292(d)(2). We review questions of law, including the interpretation of statutes and regulations, *de novo*. *DeLaRosa v. Peake*, 515 F.3d 1319, 1321 (Fed. Cir. 2008).

The parties agree that the Board erred by not analyzing whether Ms. Byron established a direct service connection. The parties disagree, however, whether the Veterans Court must remand, or whether it may assess the facts in the first instance. We resolved this issue in *Hensley v. West*, where we

held that when the Board misinterprets the law and fails to make the relevant initial factual findings, "the proper course for the Court of Appeals for Veterans Claims [is] to remand the case to the [Board] for further development and application of the correct law." 212 F.3d 1255, 1264 (Fed. Cir. 2000). We explained that the statutory provisions governing the Veterans Court "are consistent with the general rule that appellate tribunals are not appropriate for a for initial fact finding." *Id.* at 1263; *see also* 38 U.S.C. § 7261(c) (2006) ("In no event shall findings of fact made by the Secretary or the Board of Veterans' Appeals be subject to trial de novo by the [Veterans Court].").

To the extent that Ms. Byron argues that *Gonzales v. Thomas*, 547 U.S. 183 (2006) (per curiam) and *INS v. Ventura*, 537 U.S. 12 (2002) (per curiam) provide otherwise, we disagree. The Supreme Court held that when an agency has not made an initial determination, "the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." *Thomas*, 547 U.S. at 186 (quoting *Ventura*, 537 U.S. at 16). In *Ventura*, the Supreme Court explained:

Generally speaking, a court of appeals should remand a case to an agency for decision of a matter that statutes place primarily in agency hands. . . . The agency can bring its expertise to bear upon the matter; it can evaluate the evidence; it can make an initial determination; and, in doing so, it can,

through informed discussion and analysis, help a court later determine whether its decision exceeds the leeway that the law provides.

537 U.S. at 16-17. It is not enough that only a few factual findings remain or that the applicant may have a strong case on the merits. None of the rare circumstances found in the cases cited by Ms. Byron from other circuits is present in the current case. For example, this case does not "involve[] a legal question, as opposed to the factual questions that were at issue in *Ventura* and *Thomas*." *See Calle v. U.S. Attorney Gen.*, 504 F.3d 1324, 1330 (11th Cir. 2007). This is also not a case where the agency analyzed the issue in the first instance. *See Sierra Club v. U.S. Envtl. Prot. Agency*, 346 F.3d 955, 962-63 (9th Cir. 2003). Nor is this a case where the relevant facts were admitted. *See Hussain v. Gonzales*, 477 F.3d 153, 156-57 (4th Cir. 2007). The government even acknowledged at oral argument that had they conceded the relevant facts, it would have been proper for the Veterans Court to reverse rather than remand. Oral Argument at 24:45-26:00, *Byron v. DVA*, No. 2011-7170, available at http://oralarguments.cafc.uscourts.gov/default.aspx?fl=2011-7170.mp3. Finally, this is not a case where the Veterans Court is finding facts related solely to the issue of harmless error, which according to the statute, it may do in the first instance. *Newhouse v. Nicholson*, 497 F.3d 1298, 1301-02 (Fed. Cir. 2007). When there are facts that remain to be found in the first instance, a remand is the proper course.

In this case, the government argues that at least two unresolved factual issues must be addressed before Ms. Byron may be awarded an earlier effective date based on a direct service connection. In particular, Ms. Byron must first show that her husband was exposed to radiation during service. *See* 38 C.F.R. § 3.303. Ms. Byron must also show that her husband's death was caused by such exposure. *See id.* It is not enough for Ms. Byron to claim that all of the evidence of record supports her position. The Board must still make an initial determination of whether Ms. Byron has sufficiently supported a claim for an earlier effective date. *See Thomas*, 547 U.S. at 186. It may well be that the Board concludes that Ms. Byron has established these facts. That, however, is precisely what needs to be done by the fact-finding agency in the first instance, not by a court of appeals.

For the foregoing reasons, we affirm the Veterans Court's decision remanding the case to the Board.

AFFIRMED

APPENDIX B

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 09-4634

LADY LOUISE BYRON

v.

ERIC K. SHINSEKI

MEMORANDUM DECISION

DATED: June 20, 2011

Before: SCHOELEN, *Judge.*

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

SCHOELEN, *Judge:* The appellant, Lady Louise Byron, appeals through counsel a December 11, 2009, Board of Veterans' Appeals (Board) decision that (1) granted her entitlement to an effective date of May 1, 1988, for the award of service connection for the cause of the death of a her husband, a veteran; (2) denied her entitlement to the reinstatement of dependency and indemnity compensation (DIC) benefits for the period from August 8, 1991, until October 1, 1998; and (3) denied her entitlement to accrued benefits. Record of Proceedings (R.) at 3-31. The appellant does not dispute the Board's findings concerning her reinstatement of DIC and accrued benefits claims, and the Court will consider them abandoned on appeal. *See Ford* v. *Gober,* 10 Vet. App.531, 535 (1997) (holding that claims not argued on appeal are deemed abandoned); *Bucklinger* v. *Brown,* 5 Vet. App.435 (1993). This appeal is timely, and the Court has jurisdiction to review the Board's decision pursuant to 38 U.S.C. §§ 7252(a) and 7266(a). Single-judge disposition is appropriate. *Frankel* v. *Derwinski,* 1 Vet. App.23, 25-26 (1990). For the following reasons, the Court will vacate the Board's decision and remand the matter for further proceedings consistent with this decision.

I. BACKGROUND

A. Facts

The appellant is the surviving spouse of Dennis Donald Acheson, a veteran who served on

active duty in the U.S. Army from September 1952 until July 1954. R. at 2418. In March 1968, the veteran submitted a claim for benefits to VA. R. at 881. He reported that he had been diagnosed with non-Hodgkin's lymphoma and was unable to work. *Id.* He further stated that he felt his condition was caused by work he did while in service. *Id.* He wrote that, for security reasons, he could not discuss the precise nature of some of what he experienced in service, but noted that he had been sent to participate in tests at Camp Desert Rock, the Nevada Test Site, White Sands Proving Ground, and Dugway Proving Ground, and that while at those locations, he was issued a radiation badge to register his exposure to radiation. *Id.*

The veteran died on August 30, 1971. R. at 2588. His death certificate lists his cause of death as intra-abdominal metastases due to reticulum cell sarcoma, from which he had suffered for more than three years. *Id.* In September 1971, the appellant filed an application for DIC or death pension. R. at 2580-83. She also submitted a statement describing her husband's disease and stating her belief that his illness and death were caused by his in-service work. R. at 1213-14, 2409-14. The appellant was awarded death pension benefits soon thereafter. R. at 23, 2574. According to the Board, however, the appellant's DIC claim was not adjudicated. R. at 24.

In March 1996, Dr. W.D. Feinberg submitted a statement describing his treatment of the veteran in the years leading up to his death. R. at 166-67.

Also in March 1996, Dr. Harold Block submitted a statement in which he opined that the veteran's cause of death, reticular cell sarcoma, is synonymous with non-Hodgkin's lymphoma. R. at 160. The record also includes documents from Drs. Paul Mathew and George L. Voelz indicating that they agree with Dr. Block's opinion. R. at 170, 199.

In April 1996, a statement was submitted by Oral C. Lutener, a member of the committee that hired the veteran to work for the U.S. Army Air Defense Board in 1954. R. at 171-72. Mr. Lutener stated that in 1953 the veteran was an onsite participant in nuclear testing at the Nevada Test Site during an operation known as Operation Upshot-Knothole. R. at 172. In a June 1996 statement, Angel Alderete reported that the veteran was present during atmospheric nuclear testing. R. at 175-76. In August 1996, the appellant filed a claim to reopen her earlier claim for DIC benefits. R. at 2382. In October 2001, veteran Kenneth R. Kendall submitted a statement indicating that he had personal knowledge that the veteran was present during nuclear testing. R. at 1510-12.

In an August 2003 rating decision, the VA regional office (RO) granted the appellant presumptive service connection for the veteran's cause of death after finding that non-Hodgkin's lymphoma "was added to the presumptive list of diseases associated with exposure to ionizing radiation on May 20, 1988." R. at 1203-05. The RO conceded, based on the statement of Mr. Kendall,

that the veteran was present at the location of nuclear testing during his service. R. at 1204. The RO assigned an effective date of August 14, 1995, one year prior to the date of receipt of the appellant's claim. *Id.* The appellant disagreed with the effective date assigned by the RO and appealed to the Board. R. at 1353. In a September 11, 2006, decision, the Board affirmed the RO's assignment of August 14, 1995, as the proper effective date. R. at 1284-92. This Court originally affirmed the Board's decision, but, upon receipt of a motion for reconsideration from the appellant, it issued a memorandum decision withdrawing its earlier decision and vacating the Board's decision and remanding the matter for the Board to determine whether VA had adequately adjudicated the appellant's DIC claim. R. at 89-92.

In October 2007, Dr. Feinberg submitted an additional statement in which he wrote that the veteran's death "was due to radiation exposure which was caused by his participation in nuclear tests during his military service.... Therefore, death was caused by his military service." R. at 540. Dr. Block submitted a statement concurring in Dr. Feinberg's assessment. R. at 543. Also in October 2007, Dr. Cornelius K. Blesius submitted a statement in which he opined that the veteran's disease "developed as a result of repeated radiation exposure during his military service from 1952 to 1954. Therefore, his radiation exposure during his military service triggered the cause of death." R. at 542.

The Board, in its December 11, 2009, decision here on appeal, granted the appellant entitlement to an effective date of May 1, 1988, for the award of service connection for the death of the veteran. The Board found that the appellant submitted an adequate claim on September 10, 1971, for both death pension and DIC, "which includes the claim of service connection for the cause of the [v]eteran's death." R. at 22. The Board further held that the appellant's claim for DIC based on service connection for the cause of the veteran's death "remained pending until it was granted by the RO in the August 2003 rating decision on appeal." R. at 24.

The Board noted that the effective date of the appellant's claim would, based on regulatory authority, be set at either the date of the receipt of the claim or the date entitlement arose, whichever is later. *Id.* The Board found that the appellant's entitlement to benefits arose on the date that the Radiation-Exposed Veterans Compensation Act of 1988, 100 P.L. 321, 102 Stat. 485, went into effect. *Id.* The law, according to the Board, added lymphomas, including the disease from which the veteran died, to the list of diseases associated with exposure to ionizing radiation that receive presumptive service connection. *Id.* Since the new law allowed the veteran's death to be service connected and was enacted after the appellant filed her claim, the Board set the effective date of the appellant's benefits to match the effective date of the law - May 1, 1988. *Id.*

The Board concluded that "there is no legal basis for an earlier effective date." R. at 25. The Board acknowledged that the appellant argued that she was entitled to an effective date of September 1971 because "she has submitted evidence of direct causation." *Id.* The Board, however, found that service connection for the cause of the veteran's death "based on proof of actual causation has not been established." *Id.*

The Board noted that, to establish direct service connection, "there must be competent and probative evidence of both in-service radiation exposure and of a connection between the [v]eteran's death and the claimed in-service radiation exposure." *Id.* The Board reported that the RO conceded that the veteran was exposed to radiation during service. *Id.* The Board acknowledged that in 1996 VA received medical information indicating that the veteran died from non-Hodgkin's lymphoma and indicating a link existed between his in-service radiation exposure and death. However, the Board stated:

[E]ven assuming arguendo that the record on appeal now contains evidence sufficient to establish service connection for the cause of the [v]eteran's death on a direct basis, as the appellant claims, such evidence was not received by VA prior to 1996. For these reasons, the Board finds that although the appellant's claim of service connection for the cause of the [v]eteran's death was received by VA on September 10, 1971, her entitlement did not arise

prior to May 1, 1988, the effective date of the liberalizing law adding lymphomas (except Hodgkin's disease) to the list of presumptive diseases associated with exposure to ionizing radiation.

B. Arguments on Appeal

The appellant asserts that she still has a pending claim for DIC because the RO made a decision on her "presumptive service connection claim," but not her "direct service connection claim," and thus her "direct service connection claim" remains open. Appellant's Brief (Br.) at 15. She argues that the Board, in failing to appreciate this distinction, incorrectly assigned the date of her entitlement to benefits without considering her direct service-connection claim and inappropriately failed to consider her evidence of a nexus between the veteran's death and his service. *Id.* at 14-16. The appellant argues that the evidence indicates that direct service connection is warranted *(id.* at 16-17) and, therefore, the Court should reverse the Board's decision *(id.* at 20-22; Reply at 2-8).

The Secretary concedes that the Board committed error by not adequately considering evidence supporting direct service connection and addressing whether a finding that direct service connection is warranted creates an entitlement to an earlier effective date. Secretary's Br. at 13. The Secretary further concedes that the Board failed to adequately consider medical and lay evidence

relating to establishing nexus in support of a direct service-connection claim. *Id.* at 14. The Secretary also concedes that the Board failed to address 38 C.F.R. § 3.400(c)(2) in determining the effective date of the appellant's claims. The Secretary, however, disputes the appellant's assertion that reversal is warranted, and argues that remand is the appropriate remedy. *Id.* at 16-18.

II. ANALYSIS

A. Direct Service Connection

A veteran's surviving spouse is eligible for DIC benefits when a qualifying veteran dies from a service-connected disability. 38 U.S.C. § 1310; 38 C.F.R. § 3.5(a) (2010). The service-connected disability may be either the principal or a contributory cause of death. 38 C.F.R. § 3.312(a) (2010). Entitlement to service connection can be established on a direct basis or by a statutory presumption that certain conditions are related to certain types of service. *Combee v. Brown,* 34 F.3d 1039, 1043-44 (Fed. Cir. 1994); *see also* 38 U.S.C. §§ 1101, 1112, 1116; 38 C.F.R. §§ 3.307, 3.309, 3.316 (2010).

In this case, the Board granted the appellant service connection based on presumption but, the parties allege, did not consider eligibility based on direct service connection. Establishing service connection on a direct basis generally requires medical or, in certain circumstances, lay evidence of

(1) a current disability, or in the case of the veteran, the disability that caused his death; (2) incurrence or aggravation of a disease or injury in service; and (3) a nexus between the claimed in-service injury or disease and the disability that resulted in death. *See Davidson v. Shinseki,* 581 F.3d 1313, 1316 (Fed. Cir. 2009); *Hickson v. West,* 12 Vet. App.247, 252 (1999); *Caluza v. Brown,* 7 Vet. App.498, 506 (1995), *aff'd per curiam,* 78 F.3d 604 (Fed. Cir. 1996) (table). A finding of service connection, or no service connection, is a finding of fact that the Court reviews under the "clearly erroneous" standard. *See Dyment v. West,* 13 Vet. App.141, 144 (1999). A finding of fact is clearly erroneous when the Court, after reviewing the entire evidence, "is left with a definite and firm conviction that a mistake has been committed." *United States v. U.S. Gypsum Co.,* 333 U.S. 364, 395 (1948).

When deciding a matter, the Board must include in its decision a written statement of the reasons or bases for its findings and conclusions, adequate to enable an appellant to understand the precise basis for the Board's decision as well as to facilitate review in this Court. *See* 38 U.S.C. § 7104(d)(1); *Allday v. Brown,* 7 Vet. App.517, 527 (1995); *Gilbert v. Derwinski,* 1 Vet. App.49, 56-57 (1990). To comply with this requirement, the Board must 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. *See Caluza,* 7 Vet. App.at 506; *Gilbert,* 1 Vet. App.at 57.

The appellant begins her argument by asserting that the Board's finding that her claim was pending until the October 2003 RO decision is erroneous because the RO made a finding on her "presumptive service connection claim" only and not her "direct service connection claim." Appellant's Br. at 15. She contends that her "direct service connection claim" is still pending. *Id.* The appellant's argument misapprehends the nature of her claim. Presumptive and direct service connection are different theories available to support the same claim, not themselves individual claims. *See Hillyard v. Shinseki,* 24 Vet. App.343 (2011) (defining a "claim" as an expressed belief in an entitlement to a benefit, and a "theory" as a means of establishing entitlement to a benefit); *Roebuck* v. *Nicholson,* 20 Vet. App.307, 313 (2009) (holding that a theory is synonymous with a "means of establishing entitlement to a benefit for a disability" and if "theories all pertain to the same benefit for the same disability, they constitute the same claim."); *Bingham* v. *Principi,* 18 Vet. App.470, 474 (finding that "direct and presumptive service connection are, by definition, two means (i.e., two *theories*) by which to reach the same end, namely service connection."). The Board apparently concluded that the RO had granted the appellant's claim for DIC under one of the theories available and therefore her claim was no longer pending.

When considering a claim, however, the Board has a duty to address all issues reasonably raised either by the appellant or the contents of the record. *See Robinson v. Mansfield*, 21 Vet. App.545, 552-56 (2008); *aff'd sub nom. Robinson v. Shinseki*, 557 F.3d 1355 (Fed. Cir. 2009). The Secretary and the appellant agree that the Board failed to adequately address whether the appellant's claim for service connection should be granted under the theory of direct service connection, and, as a consequence, failed to determine whether a finding of direct service connection would entitle the appellant to an earlier effective date. As they assert, it is clear from the Board's opinion that it did not in any way analyze or weigh the evidence of record supporting direct service connection. R. at 25-26. The Board acknowledged that the RO conceded radiation exposure, and acknowledged the existence of evidence suggesting a nexus between the veteran's cause of death and his service, but did not consider the evidence or make any factual findings concerning direct service connection apparently on the basis that the evidence "was not received by VA prior to 1996," and thus, even if service connection was granted on a direct basis, May 1, 1988, is still the earliest effective date available to the appellant. R. at 26.

Generally, the effective date of an award "shall be fixed in accordance with the facts found, but shall not be earlier than the date of receipt of application therefore." 38 U.S.C. § 5110(a). Moreover, in a DIC claim, if the claim is received

within one year from the veteran's date of death, the effective date "shall be the first day of the month in which the death occurred." 38 U.S.C. § 5110(d)(1). The appellant and the Secretary agree that the Board's reasoning is faulty under the precedent set in *McGrath v. Gober*, 14 Vet. App.28 (2000). In *McGrath*, the Court held that "in an original claim for benefits, the date the evidence is submitted or received is irrelevant when considering the effective date of an award.... Thus, when an original claim for benefits is pending... the date on which the evidence is submitted is irrelevant even if it was submitted over twenty years after the time period in question." 14 Vet. App.at 35. The Court held that an appellant may use evidence, no matter what date it was submitted, to support a claim for an earlier effective date in an original claim for compensation. *Id.*

The Court agrees with the Secretary and appellant that the Board improperly failed to make a determination about whether direct service connection is warranted based on the its erroneous assumption that, even if it found eligibility based on direct service connection, it would not impact the effective date of the appellant's benefits. The Board should have considered all of the evidence of record, determined whether direct service connection is warranted, and then, if it is, determined the earliest possible effective date for the appellant's claims based on its finding. Therefore, its statement of reasons or bases supporting its assignment of May 1, 1988, as the effective date for the appellant's

benefits is inadequate. *See* 38 U.S.C. § 7104(d)(1); *Allday, Caluza,* and *Gilbert,* all *supra.*

B. Remand is Appropriate

The appellant argues that the Court should reverse the Board's decision rather than vacate and remand it. This Court has held that "reversal is the appropriate remedy when the only permissible view of the evidence is contrary to the Board's decision." *Gutierrez v. Principi,* 19 Vet. App.1, 10 (2004). Remand is appropriate "where the Board has incorrectly applied the law, failed to provide an adequate statement of reasons or bases for its determinations, or where the record is otherwise inadequate." *Tucker v. West,* 11 Vet. App.369, 374 (1998).

In light of the Court's decision, in order for the Board to adjudicate the appellant's claim, it will first have to weigh the evidence of record and determine whether the evidence is sufficient to support a finding of direct service connection. Such a finding is a factual conclusion. *See Dyment, supra.* If the Board does indeed grant direct service connection, it will then have to reconsider the proper effective date of the appellant's benefits. The assignment of an effective date is also a finding of fact that will not be overturned unless the Court finds it to be clearly erroneous. *Evans v. West,* 12 Vet. App.396, 401 (1999). The Court will not address whether direct service connection and an earlier effective date are warranted because that would require it to make

factual determinations in the first instance based on the evidence the Board failed to consider, which it may not do. *See Hensley v. West*, 212 F.3d 1255, 1263 (Fed. Cir. 2000) (stating that "appellate tribunals are not appropriate for a for initial fact finding"); *see also* 38 U.S.C. § 7261(c). Therefore, reversal is precluded as a remedy, and remand is appropriate. *See Tucker*, 11 Vet. App.at 374.

The appellant's argument for reversal is premised on the idea that the evidence she submitted in support of a nexus between the veteran's cause of death and his service is "overwhelming" and "undisputed" and therefore there can be no doubt that nexus is established and direct service connection is warranted. Appellant's Br. at 16-17, 20; Reply at 4. While the appellant's analysis of the evidence may very well be correct, it represents exactly the kind of factual determination reserved for the Board in the first instance. *See Hensley, supra.* The Court only has the authority to decide whether factual determinations are clearly erroneous or whether they have not been supported by an adequate statement of reasons or bases. *See Owens* v. *Brown,* 7 Vet. App.429, 433 (1995) ("It is the responsibility of the [Board], not this Court, to assess the credibility and weight to be given to the evidence."). The Court is not positioned to make findings about factual determinations yet to be made.

The appellant argues in the alternative that the Board "did review [a]ppellant's medical evidence

of nexus and committed clear error in finding it insufficient to establish actual causation." Reply at 6-7. If the Board did indeed make a nexus determination, it did not include in its decision any discernable statement of reasons or bases which would allow the Court to review its decision. Failure to provide an adequate statement of reasons or bases requires remand. *See Tucker, supra.*

III. CONCLUSION

After consideration of the appellant's and Secretary's pleadings, and a review of the record, the Board's December 11, 2009, decision is VACATED and the matter is REMANDED to the Board for further proceedings consistent with this decision.

DATED: June 20, 2011

Copies to:

Edward R. Reines, Esq.

VA General Counsel (027)

APPENDIX C

BOARD OF VETERANS' APPEALS

XC 18 459 513

IN THE APPEAL OF LADY LOUISE BYRON

IN THE CASE OF DENNIS D. ACHESON

DOCKET NO. 04-30 647

MEMORANDUM DECISION

DATED: December 11, 2009

On appeal from the Department of Veterans Affairs Regional Office in Albuquerque, New Mexico

THE ISSUES

1. Entitlement to an effective date earlier than August 14, 1995, for the award of service connection for the cause of The Veteran's death.

2. Entitled to reinstatement of Dependency and Indemnity Compensation (DIC) benefits prior to October 1, 1998.

3. Entitlement to accrued benefits.

ATTORNEY FOR THE BOARD

K. Conner, Counsel

INTRODUCTION

The Veteran served on active duty from September 1952 to July 1954. He died in August 1971. The appellant is the Veteran's surviving spouse.

This matter originally came to the Board of Veterans' Appeals (Board) from August 2003 and October 2003 determinations of the Department of Veterans Affairs (VA) Regional Office (RO) in Albuquerque, New Mexico, which granted service connection for the cause of the Veteran's death, effective August 14, 1995, and established payment of DIC benefits, effective October 1, 1998.

The appellant appealed the RO's determinations. In a September 2006 decision, the Board denied an effective date earlier than August 14, 1995, for the award of service connection for the cause of the Veteran's death, and reinstatement of DIC benefits prior to October 1, 1998. In the

Introduction portion of that decision, the Board also referred the appellant's claim of entitlement to accrued benefits to the RO for initial consideration.

The appellant appealed the Board's September 2006 decision to the United States Court of Appeals for Veterans Claims (Court). In an August 2008 memorandum decision, the Court affirmed the Board's decision. In an April 2009 memorandum decision, however, the Court granted the appellant's motion for reconsideration, withdrew its August 2008 memorandum decision, vacated the Board's September 2006 decision, and remanded the matter to the Board for readjudication.

While the above matter was pending before the Court, in a March 2008 rating decision, the RO denied the appellant's claim for accrued benefits and she disagreed with the RO's decision. In June 2008, the RO issued a Statement of the Case addressing the issue of entitlement to accrued benefits. The attached cover letter advised the appellant that if she wished to perfect an appeal, she should return the enclosed VA Form 9 within 60 days. The appellant did not do so and the RO therefore closed her appeal.

The Board notes, however, that after receiving the June 2008 Statement of the Case addressing the issue of entitlement to accrued benefits, the appellant continued to submit lengthy statements to various VA officials, including a July 2008 letter to the Director of the RO, in which she argued, inter

alia, that she is entitled to accrued benefits. To ensure that the appellant receives every possible consideration, the Board will accept her July 2008 letter to the Director of the RO in lieu of a VA Form 9. *See* 38 C.F.R. §§ 20.200, 20.202 (2009). The issues on appeal therefore include the issue of entitlement to accrued benefits.

A review of the record indicates that the appellant has had numerous representatives during the course of this claim. When this matter was last before the Board, she was represented by Keith Snyder, Esq. In May 2007, she designated the Disabled American Veterans (DAV) as her representative. *See* VA Form 21-22, Appointment of Veterans Service Organization as Claimant's Representative, executed on May 3, 2007. In September 2009, the appellant revoked DAV's power of attorney, designating the Paralyzed Veterans of America (PVA) as her representative. *See* VA Form 21-22, executed on September 2, 2009. In November 2009, the appellant revoked PVA's power of attorney. She now proceeds in this appeal *pro se*.

In September 2009, the Board denied the appellant's motion for recusal or disqualification. *See* 38 C.F.R. § 19.12, 19.14 (2009).

In October 2009, the Board granted the appellant's motion to advance her case on the Board's docket. 38 U.S.C.A. § 7107(a)(2) (West 2002); 38 C.F.R. § 20.900(c) (2009).

In a November 2009 statement, the appellant requested that the Chairman of the Board review and sign her appeal. The appellant is advised that a proceeding instituted before the Board may not be assigned to the Chairman as an individual member. *See* 38 U.S.C.A. § 7102 (West 2002). Rather, the undersigned has been designated by the Chairman to render a determination in this case, in accordance with applicable procedures. *See* 38 C.F.R. Parts 19 and 20 (2009).

FINDINGS OF FACT

1. According to his certificate of death, the Veteran died in August 1971 from intraabdominal metastases due to reticulum cell sarcoma. (Medical evidence received in 1996 indicates that reticular cell sarcoma is synonymous with non-Hodgkin's lymphoma).

2. At the time of his death, the Veteran had no pending claims for VA benefits.

3. The appellant's VA Form 21-534, Application for Dependency and Indemnity Compensation or Death Pension, was received by VA on September 10, 1971.

4. Effective May 1, 1988, The Radiation-Exposed Veterans Compensation Act of 1988, Public Law 100-321, added lymphomas (except Hodgkin's disease) to the list of presumptive diseases associated with exposure to ionizing radiation.

5. The appellant remarried on August 8, 1991, and was divorced on September 21, 1995.

6. Effective October 1, 1998, the Veterans Millennium Health Care and Benefits Act, Pub. L. No. 106-117, § 502, removed the bar for payment of DIC benefits to a surviving spouse who had remarried.

CONCLUSIONS OF LAW

1. The criteria for an effective date of May 1, 1988, for the award of service connection for the cause of the Veteran's death have been met. 38 U.S.C.A. § 5107, 5110 (West 2002 & Supp. 2009); 38 C.F.R. § 3.114, 3.400 (2009).

2. The appellant is not legally entitled to DIC benefits as the surviving spouse of the Veteran for the period from August 8, 1991, to October 1, 1998. 38 U.S.C.A. § 1310, 1311 (West 2002 & Supp. 2009); 38 C.F.R. § 3 .50, 3.55, 3.114 (2009).

3. The criteria for entitlement to accrued benefits have not been met. 38 U.S.C.A. § 5121 (West 2002 & Supp. 2009); 38 C.F.R. § 3.1000 (2009).

REASONS AND BASES FOR FINDINGS AND CONCLUSIONS

Veterans Claims Assistance Act of2000 (VCAA)

Duty to Notify

Under the VCAA, upon receipt of a complete or substantially complete application for benefits, VA is required to notify the claimant and his/her representative, if any, of any information, and any medical or lay evidence, that is necessary to substantiate the claim. 38 U.S.C.A. § 5103(a)(1) (West 2002 & Supp. 2009); 38 C.F.R. § 3.159(b) (2009); *Quartuccio v. Principi*, 16 Vet. App. 183 (2002). Proper notice from VA must inform the claimant of any information and evidence not of record (1) that is necessary to substantiate the claim; (2) that VA will seek to provide; and (3) that the claimant is expected to provide. This notice must be provided prior to an initial unfavorable decision by the agency of original jurisdiction (AOJ). *Mayfield v. Nicholson*, 444 F.3d 1328 (Fed. Cir. 2006); *Pelegrini v. Principi*, 18 Vet. App. 112 (2004).

The Court has provided additional guidance with respect to VA's VCAA notification obligations. In *Dingess/Hartrnan v. Nicholson*, 19 Vet. App. 473 (2006), the Court held that the notice requirements of section 5103(a) apply generally to the following five elements of a service connection claim: (1) veteran status; (2) existence of a disability; (3) a connection between a veteran's service and the disability; (4) degree of disability; and (5) effective date.

In *Hupp v. Nicholson*, 21 Vet. App. 342, 352-53 (2007), the Court held that in the context of a

claim for DIC benefits, the section 5103(a) notice must include: (1) a statement of the conditions, if any, for which the Veteran was service connected at the time of his or her death; (2) an explanation of the evidence and information required to substantiate a DIC claim based on a previously service-connected condition; and (3) an explanation of the evidence and information required to substantiate a DIC claim based on a condition not yet service connected.

Once a decision awarding service connection and assigning a disability rating and an effective date has been made, however, the section 5103(a) notice has served its purpose, and its application is no longer required because the claim has been substantiated. *Dingess*, 19 Vet. App. at 490. In such cases, where the appellant then files a notice of disagreement with the initial rating and/or the effective date assigned, he or she has initiated the appellate process and different notice obligations arise, the requirements of which are set forth in 38 U.S.C.A. §§ 5104 and 7105. *Id.*

This appeal concerns matters stemming from an appeal of the effective date of an award of service connection for the cause of the Veteran's death. The Board notes that after the RO granted service connection for the cause of the Veteran's death in the August 2003 rating decision, the claim of service connection was substantiated, and any defect in the notice regarding that claim was therefore not prejudicial. *See Dingess*, 19 Vet. App.at 491. The appellant has not specifically alleged any prejudice

from defective VCAA, including from any downstream elements such as the effective date assigned. *See Goodwin v. Peake*, 22 Vet. App. 128 (2008); *see also* the Court's August 2008 memorandum decision at page 1 (noting that "the Court is unable to conclude that any notice error, if committed, affected the essential fairness of the adjudication. Consequently, any notice error would have to be considered harmless). For the foregoing reasons, the Board finds that no further notification action is required.

The Board further observes that the notification requirements of 38 U.S.C.A. §§ 5104 and 7105 have been met and the appellant has not argued otherwise. For example, the record shows that the appellant was duly provided notice of the decision on appeal, as well as an explanation of the procedure for obtaining appellate review of the decision. Following receipt of her notice of disagreement, the appellant was appropriately notified of the pertinent criteria pertaining to effective dates in a Statement of the Case.

With respect to the issue of entitlement to accrued benefits, the record shows that in a December 2007 letter issued prior to the initial decision on the claim, the RO addressed all three notice elements delineated in 38 C.F.R. § 3.159, as well as the additional requirements delineated by the Court in *Dingess/Hartman*. Thus, VA has fulfilled its notification duties with respect to this issue. The appellant has not argued otherwise.

Duty to Assist

Under the VCAA, VA also has a duty to assist a claimant in the development of a claim. This includes assisting the claimant in procuring service treatment records and other relevant treatment records and providing a VA examination when necessary. 38 U.S.C.A. § 5103A (West 2002); 38 C.F.R. § 3.159 (2009).

In this case, the Board finds that VA has undertaken all necessary development action. The record on appeal documents exhaustive efforts on the part of the RO to compile evidence in support of the appellant's appeal. Given the nature of the questions on appeal, there is no indication of outstanding evidence or information which would be pertinent to the appeal. The appellant has not argued otherwise. Therefore, no useful purpose would be served in remanding this matter for additional evidentiary development. Such a remand would result in unnecessarily imposing additional burdens on VA, with no additional benefit flowing to the appellant. The Court has held that such remands are to be avoided. *Sabonis v. Brown*, 6 Vet. App. 426, 430 (1994).

In reaching its determination, the Board notes that neither the Court's August 2008 memorandum decision nor its April 2009 memorandum decision raised any concern regarding VA's VCAA compliance, either substantively or as to the Board's

previous discussions thereof. The Board is aware of the Court's often stated interest in conserving judicial resources and avoiding piecemeal litigation. *See Harris v. Derwinski*, 1 Vet. App. 180, 183 (1991) ("Court will [not] review BVA decisions in a piecemeal fashion"); *Fugere v. Derwinski*, 1 Vet. App. 103, 105 (1990) ("[a]dvancing different arguments at successive stages of the appellate process does not serve the interests of the parties or the Court"). Thus, if there had been specific VCAA deficiencies, such would have been raised by the Court. The Board is therefore confident that if there were errors in terms of the VCAA or the Board's discussion thereof, this would have been brought to the Board's attention for the sake of judicial economy. *See also Chisem v. Gober*, 10 Vet. App. 526, 527-8 (1997) (under the "law of the case" doctrine, appellate courts generally will not review or reconsider issues that have already been decided in a previous appeal of the same case).

BACKGROUND

The appellant and the Veteran were married in January 1953. The Veteran died in August 1971. According to his Certificate of Death, the cause of his death was intraabdominal metastases due to reticulum cell sarcoma.

According to a VA date stamp, on September 10, 1971, the RO received a typewritten VA Form 21-534, Application for Dependency and Indemnity Compensation or Death Pension, from the appellant.

On the application, signed by the appellant on September 8, 1971, she specifically indicated that she was not claiming that the cause of the Veteran's death was due to service. The RO treated the application as a claim for nonservice-connected death pension benefits.

Later that month, the RO advised the appellant that she had been awarded payment of death pension benefits, effective in September 1971.

As a condition to her continued receipt of income-based pension benefits, the appellant was required to submit periodic dependency, income and net worth information to VA. The record on appeal shows that between September 1972 and May 1980, the appellant communicated with VA on numerous occasions regarding her nonservice-connected pension benefits. In none of these communications did she make any reference to a claim of service connection for the cause of the Veteran's death.

The record on appeal contains numerous VA Forms 21-6798d, Death Award, showing that VA sent numerous letters to the appellant between October 1972 and January 1981, regarding her nonservice-connected pension benefits. Although copies of the actual letters were not filed in the claims folder, as was then VA practice, the appellant has provided a copy of letters she received from VA in 1971 and 1973 advising her of her continued entitlement to pension benefits. The form letters contain several boxes, two of which are checked. The

first checked box indicates, "You will be informed at a later date about your claim for service connected death benefits." The second checked box indicates, "The evidence does not show the veteran's death was due to any disease or injury incurred or aggravated by service. Therefore you are not entitled to service-connected death benefits which are paid at a higher rate."

In an August 1981 letter, the RO advised the appellant that her nonservice-connected death pension benefits had been terminated retroactively to January 1981, based on her failure to provide requested income information. She did not respond until December 8, 1982, when the RO received a VA Form 21-4100, Statement of Income and Net Worth, from the appellant. In an attached cover letter, the appellant indicated that she was submitting the form for the purpose of reinstating her nonservice-connected pension benefits. The appellant also indicated that she had "added a statement concerning the Service Dependency Indemnity Compensation." In the attached statement, the appellant indicated that "[d]ue to national findings and rulings, I want to re-open my claim to the very beginning (1971) and ask for investigation if my husband's death was a service-connected death." She claimed that the Veteran had been exposed to radiation during service which could have had produced his death from lymphoma.

In a February 1983 letter, the RO requested additional information from the appellant regarding

her contention that the Veteran had been exposed to radiation in service, including the tests in which he had participated, his rank, and unit of assignment. The appellant responded later that month, stating that she was unsure if the Veteran had participated in atomic testing. She indicated that she did recall that the Veteran's duties had something to do with radar, that he wore a film badge, and that his duties were classified. It does not appear that the question of service connection for the cause of the Veteran's death was thereafter adjudicated by the RO.

In a February 1983 letter, the RO notified the appellant that her nonservice-connected pension benefits had been reinstated, effective January 1, 1983. The question of service connection for the cause of the Veteran's death was not addressed. Between December 1983 and July 1989, the appellant communicated with VA on numerous occasions regarding her nonservice-connected pension benefits, but there is no indication that she raised the issue of service connection for the cause of the Veteran's death or that the question was ever addressed by the RO.

In August 1991, the appellant contacted the RO by letter and indicated that she planned to remarry: She asked that her nonservice-connected death benefits therefore be terminated. In a September 1991 letter, the RO advised the appellant that her nonservice-connected death pension benefits had been terminated, effective August 1, 1991, based on her remarriage.

According to a final decree of divorce, the appellant's marriage of August 8, 1991, was dissolved on September 21, 1995.

On August 14, 1996, the RO received a large packet of information from the appellant's then-representative. In an attached cover letter, the representative indicated that the appellant wished to submit a claim of service connection for the cause of the Veteran's death from Non-Hodgkin's lymphoma secondary to exposure to ionizing radiation in service.

The packet of information contained numerous documents, including the following:

> Affidavits from individuals who worked with the Veteran after his separation from service, and who indicated that he had participated in nuclear testing at the Nevada Test Site.
>
> A March 1996 affidavit from a private physician indicating that the Veteran had become ill in the summer of 1966, "resulting in various and continuous unsuccessful attempts at correct diagnosis and treatment. This led to hospitalization, testing, and diagnosis during early 1988." The physician noted that the Veteran had died in August 1971 from reticular cell

sarcoma, a condition which was synonymous with the term non-Hodgkin's lymphoma.

A handwritten VA Form 21-534, purportedly signed by the appellant on September 7, 1971, on which she indicated that she was claiming that the cause of the Veteran's death was due to service. This form contains no date stamp showing that it was ever submitted to or received by the RO, prior to August 14, 1996.

A photocopy of a typewritten letter, purportedly from the Veteran and dated March 17, 1968, addressed to "Veterans Administration, El Paso, Texas and Washington, DC," in which he indicated that he had been recently diagnosed as having non-Hodgkin's lymphoma and was "100% disabled, totally and permanently." The Veteran indicated that he believed that his cancer was caused by his participation in various "highly classified" tests which he was not permitted to discuss, other than to say that "I was sent to various locations on short notice to participate in 'tests' at Camp Desert Rock and Nevada Test Site, Nevada." The Veteran indicated that "[t]his letter is to serve as my claim for entitlement to VA benefits for

100% disability." This letter contains no date stamp showing that it was ever submitted to or received by the RO, prior to August 14, 1996.

A photocopy of a handwritten letter, purportedly from the appellant and dated September 7, 1971, in which she noted that her husband had died in August 1971 from non-Hodgkin's lymphoma. She claimed that this had been explained to her on several occasions by his physician, Dr. Walter Feinberg. She further indicated that she believed that the appellant's death was due to his exposure to high levels of radiation. She recalled that during his military service, he had participated in numerous classified projects which he was forbidden to discuss with her, although "words I can remember are: Camp Desert Rock; Dougway Proving Ground in Utah; Nellis Air Force Base and several test places north of Las Vegas in Nevada; Nevada Test Site." This letter contains no date stamp showing that it was ever submitted to or received by the RO, prior to August 14, 1996.

In January 1997, the appellant submitted another large packet of documents in support of her claim. In one document, entitled "Comments for the

Record" she claimed that in September 1971, her representative "submitted simultaneously, on my behalf, two applications for benefit claims. The first one, 09/07/71, was for service-connected death benefits (the original claim). The second one, 09/08/71 was for nonservice-connected death pension. He submitted both claims on the same day, 09/08/71." The appellant further claimed that "[s]hortly thereafter, I was informed I would not qualify (at that time) for DIC because the disease was not compensable, but the application for non-service connected death would qualify."

The packet of information contained numerous photocopied documents, including the handwritten VA Form 21-534, purportedly signed by the appellant on September 7, 1971; the typewritten letter, purportedly from the veteran and dated March 17, 1968; and a photocopy of the handwritten letter, purportedly from the appellant and dated September 7, 1971. These copies are identical to the copies submitted by the appellant on August 14, 1996, but for the fact that they contain date stamps indicating that they were received by her then representative, the VFW, on September 10, 1971. The application also contains a handwritten claims number at the top of the application, which belongs to another veteran. (A search of the other veteran's claims folder was conducted to ensure that it did not contain any document pertaining to the appellant's first husband, but the search was negative). None of the documents contained in the January 1997 packet of information contains a date stamp indicating that

they were received by VA in September 1971, or at anytime prior to 1997.

In connection with the appellant's claim, the RO contacted the service department to request information regarding the Veteran's possible in-service radiation exposure. The service department responded that available records did not document the Veteran's presence during atmospheric nuclear testing. Further, a careful review of Dosimetry data revealed no record of radiation exposure for him. *See* March 1997 letter from Defense Special Weapons Agency.

In an April 1997 rating decision, the RO denied service connection for the cause of the Veteran's death secondary to radiation exposure, finding that service department records did not establish that the Veteran had been exposed to ionizing radiation during service. The appellant appealed the RO's decision. In a March 1998 decision, the Board similarly denied service connection for the cause of the Veteran's death, also finding, *inter alia*, that the Veteran was not a "radiation exposed veteran" as defined by applicable regulation, nor did the record contain probative evidence relating the cause of the Veteran's death to in-service radiation exposure to warrant service connection on a direct basis. The appellant appealed the Board's decision.

While the matter was pending before the Court, in February 1999, the appellant's then-

attorney and a representative of VA's General Counsel, on behalf of the Secretary, filed a joint motion for remand, arguing that that VA had failed in its duty to assist the appellant in developing her claim by requesting additional verification from the service department that the Veteran had been a participant in a radiation risk activity. In setting forth the factual background of the appeal, the joint motion incidentally noted that the "Appellant filed a timely application for [DIC] benefits in September 1971." In a February 1999 order, the Court granted the parties' motion, vacated the Board's decision, and remanded the matter for additional evidentiary development.

Additional development thereafter conducted by the RO resulted in continued responses from the service department to the effect that military records did not indicate the Veteran's participation in a radiation risk activity during service. The service department also indicated that a careful review of all available atmospheric nuclear testing Dosimetry records for the entire period of the Veteran's military service revealed no record of radiation exposure for the Veteran. *See* April 2000 and March 2001 letters from Defense Threat Reduction Agency (DTRA).

In May 2001, the appellant submitted a statement from K.K., an individual who served with the Veteran, to the effect that he had personal knowledge of the Veteran's presence at the Nevada Test Site during atmospheric nuclear testing.

The RO provided a copy of K.K.'s letter to the service department and asked for additional evidentiary development. In a January 2002 letter, DTRA responded that they had reviewed K.K.'s statement to the effect that the Veteran had been present at the Nevada Test Site during Operation UPSHOT-KNOTHOLE. They indicated that military records, including the Veteran's Nuclear Test Personnel Review file and morning reports, did not corroborate K.K.'s statement or otherwise establish the Veteran's participation in UPSHOT-KNOTHOLE. They explained that had the Veteran been present at the Nevada Test Site during Operation UPSHOTKNOTHOLE, such would have been indicated in morning reports.

In an August 2003 rating decision, the RO granted service connection for the cause of the Veteran's death, finding that K.K.'s affidavit noted the Veteran's participation in a radiation risk activity and that because the service department could not confirm the Veteran's presence or absence during such activity, exposure was conceded under applicable regulation. *See* 38 C.F.R. § 3.311 (a)(4)(i). Given the evidence showing that the Veteran died from non-Hodgkin's lymphoma, the RO determined that presumptive service connection was warranted. The award was made effective August 14, 1995 , one year prior to the date of the appellant's August 1996 claim. *See* 38 C.F.R. § 3.114.

In an October 2003 letter, the RO notified the appellant of its decision and further advised her that

payment of DIC benefits as the surviving spouse of the Veteran would begin October 1, 1998, the earliest date VA regulations were liberalized to remove the bar for DIC benefits to a surviving spouse who had remarried. *See* 38 C.F.R. § 3.55(a) (2008) (effective October 1, 1998) (providing that the remarriage of surviving spouse does not bar DIC benefits if remarriage is terminated by divorce).

The appellant appealed the RO's decision, disagreeing with both the effective date of the award of service connection for the cause of the Veteran's death, as well as the effective date for payment of DIC benefits.

In a September 2006 decision, the Board denied effective date earlier than August 14, 1995, for the award if service connection for the cause of death. The Board found that the application received by VA in September 1971 expressly indicated that the appellant did not wish to seek service connection for the cause of the Veteran's death. The Board considered the copy of the handwritten version of the September 1971 application which expressly indicated that the appellant sought service connection for the cause of the Veteran's death, but found that absent a date stamp from the RO, it could not be considered as having been filed in 1971.

The Board found, in any event, that any claims pending in 1971 and/or 1982, were subject to

RU determinations regarding pension benefits. The Board noted that

> A recent case, *Deshotel v. Nicholson*, No. 05-7155 (Fed. Cir. July 27, 2006), held that where a claimant files "more than one claim with the RO at the same time, and the RO's decision acts (favorably or unfavorably) on one of the claims but fails to specifically address the other claim, the second claim is deemed denied, and the appeal period begins to run." Thus, had the appellant in this case believed that the RO improperly failed to address her claim of service connection for the cause of the veteran's death, her remedy was either to file a timely direct appeal, or allege clear and unmistakable error in that determination that failed to address her claim. *See id.*

Based on the foregoing, the Board concluded that the appellant's claim of service connection for the cause of death was received by VA on August 14, 1996. The Board determined that the award of service-connection for the cause of the Veteran's death was therefore properly effective August 14, 1995, one year prior to the date of such claim. The Board further found that payment of DIC benefits was not warranted prior to September 30, 1998. The Board explained that when the appellant filed her August 1996 claim of service connection for the

cause of the Veteran's death, the law did not provide for reinstatement of DIC in the event of remarriage of a surviving spouse terminated by divorce. It was not until that right was conferred by statute, effective October 1, 1998, that payments could resume.

The appellant appealed the Board's decision to the Court, arguing only that the VA had failed to comply fully with its duty to notify under 38 U.S.C.A. § 5103(a). In an August 2008 memorandum decision, the Court affirmed the Board's decision, holding that any notice error was not prejudicial and that by raising no arguments regarding the merits of her claims, those issues were deemed abandoned.

In August 2008, the appellant filed a motion for reconsideration, arguing for the first time before the Court that she had filed claims for DIC in September 1971 and December 1982. She further argued that the Court's February 1999 order granting the parties' joint motion established that she had filed a DIC claim in 1971 because such a finding was conceded in the factual background portion of the joint motion.

In an April 2009 memorandum decision, the Court granted the appellant's motion for reconsideration, noting that "[b]ecause the factual basis underlying the Court's decision that she has received the earliest effective date as a matter of law may be undercut by the potential concession made in

the 1999 JMR that the Court granted, [the appellant's] motion for reconsideration will be granted." The Court cited "*McCreary v. Nicholson*, 19 Vet. App. 324, 234 (2005)" in support of its holding, a case pertaining to the equitable tolling of 120-day judicial-appeal. Its relevance to the instant case is unclear, although it appears the Court cited this case in error, particularly given the obvious typographical error in the pinpoint citation.

The Court also noted,

> In addition to the language in the February 1999 JMR implying that Ms. Byron had filed a DIC benefits claim in September 1971, extant VA regulations provided that a claim by a widow for death pension benefits will also be considered to be a claim for DIC benefits. 38 C.F.R. § 3.152(b) (1) (1971); *see Isenhart v. Derwinski*, 3 Vet. App. 177, 179 (1992). The Board found that any potential pending claims filed in either 1971 or 1982 were implicitly adjudicated when Ms. Byron was awarded death pension benefits in February 1983. *See Deshotel v. Nicholson*, 457 F.3d 1258, 1261 (Fed. Cir. 2006). However, as the Secretary states, the Court has instructed that a claim remains pending until there is either a recognition of the substance of the claim in an RO decision from which

> a claimant could deduce that the claim was adjudicated or an explicit adjudication of a subsequent claim for the same disability. *Ingram v. Nicholson*, 21 Vet. App. 232, 243 (2006). Thus, the Board's statement of reasons or bases for its conclusion that the grant of non-service-connected death pension benefits in 1983 reasonably put [appellant] on notice that any pending claim for service-connected benefits, including DIC benefits, had been denied is not adequate for judicial review.

Entitlement to an effective date earlier than August 14, 1995, for the award of service connection for the cause of the Veteran's death.

Except as otherwise provided, the effective date of an award of DIC based on an original claim will be the date of receipt of the claim or the date entitlement arose, whichever is the later. 38 U.S.C.A. § 5110 (West 2002 & Supp. 2009); 38 C.F.R. § 3.400 (2009).

The effective date of an award of DIC for which application is received within one year of the date of death shall be the first day of the month in which death occurred. 38 U.S.C.A. § 5110(a), (d); 38 C.F.R. § 3.400(c).

When VA awards benefits pursuant to a liberalizing regulation, however, the award may not

be made effective earlier than the effective date of the liberalizing regulation. 38 U.S.C.A. § 5110(g); 38 C.F.R. § 3.114.

As discussed above, the record on appeal shows that on September 10, 1971, the RO received a typewritten VA Form 21-534, Application for Dependency and Indemnity Compensation or Death Pension, from the appellant. On the application, the appellant specifically indicated that she was not claiming that the cause of the Veteran's death was due to service.

The record on appeal also includes photocopies of a handwritten VA Form 21-534 and letter, both signed by the appellant in September 1971, on which she claims that the Veteran's death was due to service. One version of these photocopies, apparently obtained from the appellant's personal files, contains no date stamps. Another version of these photocopies, apparently obtained from the files of the appellant's former representative, contains date stamps showing that they were received by V.F.W. in September 1971. Neither version contains any date stamps showing that they were received by VA in September 1971, or at any time prior to 1996. Based on this record, the Board must conclude that although the appellant may have completed those documents in September 1971, her representative never submitted them to VA. In that regard, the Board observes that the copies apparently obtained from the file of the appellant's former representative bear the claims number of a different veteran. VA

has inspected that veteran's file but found no documentation belonging to the appellant's first husband.

In any event, the Board finds that the fact that the handwritten version of VA Form 21-534 was not received by VA in September 1971 is immaterial. Under 38 U.S.C.A. § 5101(b)(1) and 38 C.F.R. § 3.152(b) (1) , a claim by a surviving spouse for death pension "shall be" considered a claim for DIC. Indeed, in *Isenhart v. Derwinski*, 3 Vet. App. 177 (1992), the Court noted that the statutory and regulatory language was "clear and unambiguous" that a claim for death pension "shall be" considered a claim for DIC. *Isenhart*, 3 Vet. App. at 179. Thus, the Court held that the law

> does not give the Secretary an option; nor does it permit the Secretary to delve into the intent of the claimant; nor does it allow a claimant to make an election. As a matter of law, a claim for DIC shall be considered as a claim for a pension and a claim for a pension shall be considered a claim for DIC.

Id.

Based on the foregoing, the Board finds that the typewritten version of the appellant's VA Form 21-534, received by VA on September 10, 1971, constituted a claim for both death pension and DIC, which includes the claim of service connection for the cause of the Veteran's death, and VA was obligated to adjudicate both claims.

As set forth above, the record on appeal is clear that the RO adjudicated the appellant's death pension claim in September 1971. The record on appeal, however, does not show that the RO formally adjudicated the claim for DIC based on service connection for the cause of the veteran's death in 1971 or, indeed, at any time prior to April 1997. Under these circumstances, the question before the Board is whether the appellant's claim for DIC based on service connection for the cause of the Veteran's death was pending from September 10, 1971. *See* 38 C.F.R. § 3.160 (defining "pending claim").

As the Board noted in its now vacated September 2006 decision, in *Deshotel v. Nicholson*, 457 F.3d 1258, 1261 (Fed. Cir. 2006), the Federal Circuit held that "[w]here the veteran files more than one claim with the RO at the same time, and the RO's decision acts (favorably or unfavorably) on one of the claims but fails to specifically address the other claim, the second claim is deemed denied, and the appeal period begins to run."

Since the Board's September 2006 decision, however, the Court has issued an opinion instructing that the Federal Circuit's language in *Deshotel* is to be interpreted narrowly, "stand[ing] for the proposition that, where an RO decision discusses a claim in terms sufficient to put the claimant on notice that it was being considered and rejected, then it constitutes a denial of that claim even if the formal adjudicative language does not 'specifically'

deny that claim." *Ingram v. Nicholson*, 21 Vet. App. 232, 255 (2007). In other words, the Court has held that a claim "remains pending until there is either a recognition of the substance of the claim in an RO decision from which a claimant could deduce that the claim was adjudicated or an explicit adjudication of a subsequent 'claim' for the same disability." *Id.* at 243.

In this case, the record on appeal shows that in a September 1971 letter, the appellant was advised that she had been awarded death pension benefits. Ordinarily, the appellant and her representative could be expected to know that any claim for DIC based on service connection for the cause of the Veteran's death had been implicitly denied, as one may not receive both death pension and DIC simultaneously.

In this case, however, the appellant has provided copies of 1971 and 1973 form letters she received from VA in connection with her receipt of pension benefits. These form letters display two checked boxes—the first indicates, "You will be informed at a later date about your claim for service-connected death benefits." The second box checked indicates, "The evidence does not show the veteran's death was due to any disease or injury incurred or aggravated by service. Therefore you are not entitled to service-connected death benefits which are paid at a higher rate."

Given these inconsistencies, the Board finds that these letters do not provide a sufficient basis upon which the appellant could have deduced that her claim had been finally adjudicated. Affording the appellant the benefit of the doubt, therefore, the Board finds that her claim for DIC based on service connection for the cause of the Veteran's death was received by VA on September 10, 1971, and remained pending until it was granted by the RO in the August 2003 rating decision on appeal.

As noted, applicable statue and regulations provide that the effective date of an award of DIC based on an original claim will be the date of receipt of the claim or the date entitlement arose, whichever is the later. 38 U.S.C.A. § 5110 (West 2002); 38 C.F.R. § 3.400 (2009).

In this case, the appellant's entitlement to DIC arose pursuant to a liberalizing law which added lymphomas (except Hodgkin's disease) to the list of presumptive diseases associated with exposure to ionizing radiation, effective May 1, 1988. *See* Radiation-Exposed Veterans Compensation Act of 1988, Public Law 100-321, section 2(a), 102 Stat. 485-86. Under 38 U.S.C.A. § 5110(g), 38 C.F.R. § 3.114(a), when VA awards benefits pursuant to a liberalizing regulation, the award may not be made effective earlier than the effective date of the liberalizing regulation.

Under the facts of this case, therefore, an effective date of May 1, 1988, for the award of service

connection for the cause of the Veteran's death, is appropriate and there is no legal basis for an earlier effective date.

In reaching this determination, the Board has considered the appellant's contentions to the effect that she is entitled to an effective date of September 1971 for the award of service connection for the cause of the Veteran's death as she has submitted evidence of direct causation. *See e.g.* November 2009 statement from appellant at page 3 ("And appellant elects NOW to be paid from September 1971 to the present time under provisions of 38 CFR 3.303(d) and is so entitled because it is established that the disease diagnosed after discharge was otherwise incurred during active service, including as a result of exposure to ionizing radiation."

As a preliminary matter, the Board observes that VA has determined that the appellant's entitlement to DIC benefits stems from the presumptive regulations pertaining to exposure to ionizing radiation. Service connection for the cause of the Veteran's death based on proof of actual causation has not been established.

In order to establish service connection on a direct basis, there must be competent and probative evidence of both in-service radiation exposure and of a connection between the Veteran's death and the claimed in-service radiation exposure. *See Ramey v. Brown*, 9 Vet. App. 40 (1996); *Combee v. Brown*, 34 F.3d 1039, 1043 (Fed. Cir. 1994).

In this case, as discussed in detail in its previous decisions and remands, service department records do not establish that the Veteran was exposed to ionizing radiation during service. Rather, the RO conceded exposure under 38 C.F.R. § 3.311(a)(4)(i), in light of K.K.'s statement, which was not received by VA until May 2001. Moreover, the Board notes that it was not until 1996 that VA received medical information indicating that the appellant had died from non-Hodgkin's lymphoma and suggesting a link between the claimed in-service radiation exposure and the Veteran's death. *See e.g.* 38 C.F.R. §§ 3.157; 3.114. In other words, even assuming arguendo that the record on appeal now contains evidence sufficient to establish service connection for the cause of the Veteran's death on a direct basis, as the appellant claims, such evidence was not received by VA prior to 1996.

For these reasons, the Board finds that although the appellant's claim of service connection for the cause of the Veteran's death was received by VA on September 10, 1971, her entitlement did not arise prior to May 1, 1988, the effective date of liberalizing law adding lymphomas (except Hodgkin's disease) to the list of presumptive diseases associated with exposure to ionizing radiation. Under 38 U.S.C.A. § 5110(g), 38 C.F.R. § 3.114(a), when VA awards benefits pursuant to a liberalizing regulation, as is the case here, the award may not be made effective earlier than the effective date of the liberalizing regulation. Under the facts

of this case, therefore, an effective date of May 1, 1988, for the award of service connection for the cause of the Veteran's death, is appropriate.

Whether the appellant is entitled to reinstatement of Dependency and Indemnity Compensation (DIC) prior to October 1, 1998

Applicable Law

VA pays DIC benefits to the "surviving spouse" of a veteran who died from a service-connected disability. 38 U.S.C.A. §§ 1310 (West 2002); 38 C.F.R. § 3.5 W (2009).

In pertinent part, the term "surviving spouse" means a person of the opposite sex who was the spouse of a veteran at the time of the veteran's death, and who lived with the veteran continuously from the date of marriage to the date of the veteran's death and who, except as provided in 38 C.F.R. § 3.55 , has not remarried. 38 U.S.C.A. §§ 101(3), (31) (West 2002); 38 C.F.R. § 3.50(c) (2009).

Based on the Board's decision above, the appellant is now entitled to payment of DIC benefits as the surviving spouse of the Veteran from May 1, 1998, the effective date of the award of service connection for the cause of the Veteran's death. Her eligibility to receive DIC benefits, however, terminated upon her remarriage in August 1991. She does not appear to contend otherwise. Rather, she claims that she is entitled to reinstatement of

her DIC benefits as the surviving spouse of the Veteran after the termination of her second marriage in September 1995.

Reinstatement of DIC benefits is governed by 38 U.S.C. § 103(d) and its implementing regulation, 38 C.F.R. § 3.55. These provisions have been modified several times. *See e.g. Owings v. Brown*, 8 Vet. App. 17, 23 (1995).

When the appellant was divorced in September 1995, the law then in effect barred the reinstatement of DIC benefits for a surviving spouse whose remarriage was terminated by death, divorce, or annulment. Effective October 1, 1998, the law was amended to provide that the remarriage of a surviving spouse terminated by death, divorce, or annulment, would not bar the furnishing of dependency and indemnity compensation. *See* Veterans Millennium Health Care and Benefits Act, Pub. L. No. 106-117, § 502, 113 Stat. 1574 (1999) (codified at 38 U.S.C.A. § 103(d) and 38 C.F.R. § 3.55(a)). The legislation expressly provided an effective date of October 1, 1998, and further prohibited retroactive payment prior to that date. *See also* Transportation Equity Act for the 21st Century, Pub. L. No. 105-178, § 8207, 112 Stat. 107, 495 (1998).

Based on the foregoing, the Board finds that the appropriate date for the reinstatement of the appellant's DIC benefits following termination of her remarriage by divorce is October 1, 1998, the

effective date of the liberalizing legislation. 38 U.S.C.A. § 103(d); 38 C.F.R. § 3.55, 3.114(a), 3.400(v)(4) (2009).

In reaching this determination, the Board has considered the Veterans Benefits Act of 2003, Pub. L. 108-123, § 101(a), 117 Stat. 2651 (2003) (codified at 38 U.S.C.A. § 103(d)(2)(B) and 38 C.F.R. § 3.55(a)(10)). That provision permits surviving spouses who remarried after the age of 57 to retain DIC benefits in certain circumstances. While the appellant's remarriage in 1991 was after her 57th birthday, the statute pertains to surviving spouses whose remarriages remain intact. Thus, it is not for application here. In any event, the legislation did not become effective until January 1, 2004, and further provided a prohibition of retroactive benefits. *See* Pub. L. 108-123, § 101(c),(d).

Entitlement to accrued benefits

Although a Veteran's claim generally terminates with his or her death, a qualified survivor may carry on, to a limited extent, the deceased veteran's claim by submitting a timely claim for accrued benefits. *See* 38 U.S.C.A. § 5121, 5121A (West 2002 & Supp. 2009); *see also Landicho v. Brown*, 7 Vet. App. 42, 47 (1994).

The applicable legal criteria pertaining to accrued benefits provides that periodic monetary benefits to which an individual was entitled at death under existing under existing ratings or decisions or

those based on evidence in the file at the date of death and due and unpaid, shall, upon the death of such individual, be paid to the surviving spouse or other appropriate party. 38 U.S.C.A. § 5121 (West 2002 & Supp. 2009); 38 C.F.R. § 3.1000 (2009). An application for accrued benefits must be filed within one year after the date of a veteran's death. *Id.*

The U.S. Court of Appeals for the Federal Circuit has held that for a surviving spouse to be entitled to accrued benefits, "the veteran must have had a claim pending at the time of his death for such benefits or else be entitled to them under an existing rating or decision." *Jones v. West*, 136 F.3d 1296, 1299-1300 (Fed. Cir. 1998).

After carefully reviewing the record, the Board finds that the Veteran did not have a claim for VA benefits pending at the time of his death. Therefore, the legal criteria for establishing entitlement to accrued benefits are not met, and the appeal must be denied. *See* 38 U.S.C.A. § 5121; 38 C.F.R. § 3.1000(c).

The applicable statutory and regulatory provisions require that VA look to all communications from the Veteran which may be interpreted as applications or claims - formal and informal - for benefits. In particular, VA is required to identify and act on informal claims for benefits. See 38 C.F.R. § 3.1(p), 3.155 (a) (2009); *see also Servello v. Derwinski*, 3 Vet. App. 196, 198-200 (1992).

The Board has carefully reviewed the record and can identify no communication from the Veteran which may be considered to be a pending claim for VA benefits. The appellant has pointed to a photocopy of a typewritten letter, purportedly from the Veteran and dated March 17, 1968, addressed to "Veterans Administration, El Paso, Texas and Washington, DC," in which he notes that "[t]his letter is to serve as my claim for entitlement to VA benefits for 100% disability." This letter contains no date stamp showing that it was ever submitted to or received by the RO, prior to August 14, 1996. As discussed above, the appellant has submitted two versions of this letter. The first bears no date stamp and the second displays a date stamp showing it was received by V.F.W. in September 1971. Again, however, the record on appeal contains absolutely no indication that this letter was ever submitted to or received by the RO in March 1968, or indeed at any time prior to the Veteran's death in August 1971.

The Board has considered the appellant's contentions to the effect that the March 1968 claim purportedly submitted by the Veteran prior to his death was lost by VA. There is, however, is a presumption of regularity under which it is presumed that government officials "have properly discharged their official duties." *See United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15, 47 S. Ct. 1 (1926). Clear evidence to the contrary is required to rebut the presumption of regularity. *See*

Ashley v. Derwinski, 2 Vet. App. 307 (1992); *see also Mindenhall v. Brown*, 7 Vet. App. 271 (1994).

In this case, the Board finds that there is no evidence to rebut the presumption of regularity, much less "clear evidence to the contrary." Though the appellant has claimed that the Veteran submitted a claim for benefits in March 1968, the Court has held that the statements of a claimant, standing alone, are not sufficient to rebut the presumption of regularity in RO operations. *YT v. Brown*, 9 Vet. App.195 (1996); *Mason v. Brown*, 8 Vet. App.44 (1995). Thus, the Board must presume that had the Veteran actually submitted a claim in March 1968, or at any time prior to his death, RO personnel would have associated it with the Veteran's claims folder.

The Board has considered the appellant's contentions to the effect that the Veteran's claim may have been lost, as VA lost documents she submitted in September 1971. In support of her assertion, she has submitted copies of various documents she provided to her representative in September 1971, after the Veteran's death, when compiling her application for VA death benefits. As discussed above, however, these documents are date stamped as having been received by her representative in September 1971. None of the documents exhibits a date stamp indicating that they were ever received by VA, leading to the conclusion that her representative did not actually submit them. The Board therefore finds that the

September 1971 documents submitted by the appellant are not sufficient to rebut the presumption of regularity.

Similarly, the appellant has referenced a statement from "US Senator Akaka, Chairman of VA Committee" purportedly to the effect that "VA has a terrible record for 'losing' documents sent in by claimants." The Board presumes that the appellant refers to comments on a recent audit conducted by VA's Office of Inspector General (OIG) to evaluate the effectiveness of VA regional offices' management of their mailroom operations. The Board finds that this OIG report, however, is not sufficient to constitute "clear evidence" to rebut the presumption of regularity. The audit was conducted at four regional offices, none of which is the regional office where the appellant alleges that the Veteran sent his claim. Moreover, this audit was conducted recently, and is not indicative or probative of mailroom practices in 1968.

Based on the foregoing, the Board finds that there the Veteran did not have a claim for VA benefits pending at the time of his death. Thus, there is no legal basis upon which to award accrued benefits. 38 U.S.C.A. § 5121, 5101(a); 38 C.F.R. § 3.1000; *Jones*, 136 F.3d 1299.

ORDER

An effective date of May 1, 1988, for the award of service connection for the cause of the Veteran's

death is granted, subject to the law and regulations governing the payment of monetary benefits.

Entitlement to payment of DIC benefits as the surviving spouse of the Veteran is established effective May 1, 1988, but for the period from August 8, 1991, to October 1, 1998.

Entitlement to accrued benefits is denied.

/s/ James L. March
James L. March
Veterans Law Judge, Board of Veterans' Appeals

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 2011-7170

LADY LOUISE BYRON

v.

ERIC K. SHINSEKI, SECRETARY OF VETERENS AFFAIRS

ORDER

Dated: June 19, 2012

A petition for rehearing en banc having been filed by the Appellant, and a response thereto having been invited by the court and filed by the Appellee, and the matter having first been referred as a petition for rehearing to the panel that heard the appeal, and thereafter the petition for rehearing en banc, response, reply, and briefs amicus curiae having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is DENIED, and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on June 26, 2012.

FOR THE COURT

/s/ Jan Horbaly
Jan Horbaly
Clerk

APPENDIX E

THE NATIONAL LAW JOURNAL

Veterans seek end to repeat remands
They want appeals court to rule more quickly in reviewing denials of disability benefits.

By Marcia Coyle
May 7, 2012

Lady Louise Byron is 80 years old, has terminal lung cancer and is stuck on what many veterans call "the hamster wheel of justice" in their pursuit of diability benefits.

By February of this year, her claim for benefits due to the death of her Army veteran husband had been considered 10 times – three times at the Veterans Administration's regional level and seven times at the system's appellate levels during 15 years of active litigation.

Backed by major veterans organizations, Byron and other veterans, in separate actions, are asking the U.S. Court of Appeals for the Federal Circuit to help them and similarly situated veterans to end the repeated remands of their claims.

Congress, they argue, gave the U.S. Court of Appeals for Veterans Claims express authority in 2002 to reverse denials of claims by the Board of Veterans Appeals when those denials were clearly

erroneous. The court's narrow interpretation of its authority, they contend, is thwarting Congress' goal of expediting the painfully long claims process. They do not seek reversals in every appeal to the court, but only when a veteran's record is complete, when the weight of the evidence supports the veteran and when a remand would be futile.

Every remand adds at least a year to the review process. And the Veterans Court remands a whopping 70 percent of the appeals it receives back to the board. The board, in turn, remands a huge number of those cases back to the regional level, where the cycle begins anew. Veterans win outright reversals in less than 5 percent of their appeals annually.

"I believe the court is simply way too reticent to reverse and award benefits, and I firmly believe they have the power to do so," said William Fox, former dean of Catholic University of America Columbus School of Law and a leading authority on veterans' law. "This is a very significant problem. It's particularly tragic where you have these poor people dying before the system can even give a decision on their benefit."

Established by Congress almost 24 years ago as an Article I court, the Court of Veterans Appeals was designed specifically to become expert in veterans law, Fox said. "They actually have broader powers as a kind of super-administrative agency

than they have ever been willing to admit," he said. "But they view themselves as an Article III court."

However, Chief Judge Bruce Kasold of the Veterans Court, while sensitive to delays in the whole claims process, said, "I think if we went down the road of truly looking for reversals, I believe an overwhelming number of these [denials] would be affirmed."

Time and Numbers

The court reviews decisions by the Board of Veterans Appeals. The board's most common error is failure to provide an adequate "reason and basis" for its denials of benefits, Kasold said. That requirement, he said, is imposed by law and is a safeguard for the veteran.

"We really have to understand how the board came out with its decision and that means we don't have to go to the level of having a firm conviction that it's wrong," Kasold said. "You can remand the claim for further development."

But the Veterans Court's own annual statistics appear to support the veterans' organizations arguments that something is out of whack with the disposition of veterans' appeals. Experts inside and outside of the court generally agree that it sends 70 percent of the decisions back to the board.

In fiscal year 2011, the court made decisions on the merits in 3,892 cases. Roughly 2,724 cases went back to the board; veterans won 195 reversals; and the board was affirmed in 973 decisions. The 5 percent reversal rate has been fairly consistent for years.

"No doubt appellants would like to see that higher," said the chief judge of the reversal rate. But he said that remands can often result in subsequent awards of benefits by the board, awards based on the proper development of the facts. The Veterans Administration (V.A.) never responded to phone and e-mail requests for statistics on benefits awarded by the board after remands from the court.
Kasold and his predecessor have repeatedly urged Congress to create a commission to examine the ¬judicial appellate process for veterans.

While the high remand rate reflects the "terrible track record" of the Board of Veterans Appeals in deciding veterans' appeals, said Bart Stichman, executive director of the National Veterans Legal Services Program, the rate also shows the court itself isn't doing what the federal judicial review statute requires.

"They seem to constantly require the agency to set a perfect record before they'll exercise the judgment they're supposed to exercise — that is the legal problem," Stichman said.

Legal Purgatory

In 2002, Congress amended the Veterans Benefits Act to address delays caused by the continual remands. The amendments expressly said the court shall "hold unlawful and set aside or reverse" any material finding of fact adverse to the veteran if the finding is "clearly erroneous." The court also was directed to examine whether the agency had, as required by law, given the veteran the benefit of the doubt when positive and negative evidence concerning any part of his claim was approximately in balance.

Many veterans organizations believe those amendments and their legislative history make clear that Congress intended the court to take a more aggressive and less deferential role in reviewing facts found by the Board of Veterans Appeals. The law does prohibit the court from engaging in de novo fact finding.

The Federal Circuit appeals by Byron and two other veterans are a concerted effort by national veterans organizations to persuade the Federal Circuit that it should make clear to the veterans court what those 2002 amendments require.

In Byron's case, her lawyer, Edward Reines of Weil, Gotshal & Manges, is seeking en banc review in hopes of overturning a panel ruling that he contends misapplied the amendments and another

statute allowing the Veterans Court to reverse in cases of "unreasonable delay." The Paralyzed Veterans of America and the Disabled American Veterans filed supporting briefs.

Throughout her 15 years of litigation, Byron produced medical affidavits from five of her physicist husband's treating doctors stating that his non-Hodgkin's lymphoma, which killed him at age 45, resulted from repeated radiation exposure. And she produced affidavits from witnesses who knew of his assignment in 1953 to a highly classified project for atmospheric nuclear weapons testing in Nevada.

Despite her evidence, the Board of Veterans Appeals approved only an indirect service connection to her husband's cancer. Because a direct service connection entitled her to an earlier effective date for benefits, she appealed and sought reversal from the Veterans Court. The V.A., according to Reines, never contested her factual evidence and only said it had no dosimeter record for her husband.

Because the board erred by not writing a decision specifically on the direct service connection aspect of the claim, the court said it had to remand the case.

"All of the evidence supports us, and all [the agency] relies on is the absence of their own records proving it," Reines said. "They don't say, 'Our records show he wasn't there.' I say, 'You have no

evidence and we have a lot of evidence and therefore you lose.' "

Most veterans accept the remands. Byron balked. With only about two years left to live, she chose to pursue the legal principle.

Futile Remands

A three-judge Federal Circuit panel ruled, "It is not enough for Ms. Byron to claim that all of the evidence of record supports her position. The Board must still make an initial determination of whether Ms. Byron has sufficiently supported a claim for an earlier effective date." The Veterans Court could not make that determination, the panel said, because it cannot make de novo fact-finding.

Futile and wrong on the law, professor Fox contends. "There is no more factual evidence to develop," he said. "Lady Byron's case cries out for reversal. There is language in the act that prohibits the court from conducting a trial de novo, but I don't think that's what we're talking about when we talk about reversals versus remands. I know the judges disagree with me."

Former Chief Judge William Greene said, "The board has to find the facts. Sometimes [veterans] may think their argument merits [reversal], but if we conclude there is another permissible view of the evidence, then the board has to weigh that evidence.

"We look at the complete record, but it consists of facts found."

The Federal Circuit on May 3 requested a response from the V.A. to Byron's en banc request.

In the case of Ronald Deloach, his lawyers, Igor Timofeyev and Stephen Kinnaird of Paul Hastings, assisted by Stichman, argue that the Veterans Court misinterpreted the prohibition on judicial fact-finding, thus preventing it from examining the medical evidence and reversing the board's decision.

Three years after leaving the Army where he was a neuropsychiatric specialist, Deloach was hospitalized for schizophrenia and recurrent breaks with reality, which, his treating physician believed, had begun during his service. He was in and out of hospitals in subsequent years, and in 2001 filed a disability claim.

His claim was before the board for five years, reviewed three times and remanded twice for medical exams. The board in 2008 said the preponderance of evidence weighed against finding a direct service connection to his condition.
The Veterans Court in 2011 said that to reverse the board would require weighing the opinions of Deloach's first two doctors against other evidence in the record, and that would be prohibited fact-finding. The court ruled that the board had provided an

inadequate explanation for its decision, and remanded the case for an additional medical exam — Deloach's fourth by a V.A. doctor.

The American Legion, the Military Order of the Purple Heart and Vietnam Veterans of America also urge the Federal Circuit to clarify the standards the Veterans Court should apply in reviewing facts found by the board and in reversing when clear errors are found.

Even though Congress could address the remand-reverse problem, it seems to have little interest right now, said Fox, who has been studying the system and representing veterans for two decades.

"I've been so frustrated by this whole system I'm almost to the point that I'd like to see the whole thing burn down flat and then develop a proper system for veterans' benefits," he said. "There are a lot of people starting to feel very similarly."