BOARD OF VETERANS' APPEALS

FOR THE SECRETARY OF VETERANS AFFAIRS

IN THE APPEAL OF [redacted]

IN THE CASE OF [redacted]

Appellant Represented by
Wesley Alonzo Mccauley, Agent

XC XX XXX [redacted]
Docket No. 230523-350314
Advanced on the Docket

DATE: March 26, 2024

ORDER

Entitlement to recognition of E.S. as the Veteran's surviving spouse for dependency and indemnity compensation (DIC) purposes is granted.

FINDINGS OF FACT

1. The Veteran and E.S. were married in May 1980.

2. The Veteran attempted to marry C.C. in July 1994.

3. A judgment of absolute divorce between E.S. and the Veteran was issued in May 1996.

4. The Veteran died in July 1996.

5. A November 2008 North Carolina Court of Appeals opinion voided the May 1996 divorce between E.S. and the Veteran.

6. The separation between E.S. and the Veteran prior to his death was not caused by E.S.'s intention to desert the Veteran.

CONCLUSION OF LAW

The criteria for recognition of E.S. as the Veteran's surviving spouse have been met. 38 U.S.C. §§ 101(3), 5107; 38 C.F.R. §§ 3.1, 3.50, 3.53.

REASONS AND BASES FOR FINDING AND CONCLUSION

The Veteran had active service from January 1968 to December 1969. He died in July 1996. E.S. appeared at an April 2008 hearing before a Veterans Law Judge in the Legacy appeal system. A hearing of the transcript is of record.

This appeal has a long procedural history and includes numerous prior remands of the Board of Veterans' Appeals (Board) as well as multiple instances where the United States Court of Appeals for Veterans Claims (Court) vacated denials of E.S.'s appeal. The Board most recently remanded this matter in December 2022 to ensure that the Department of Veterans Affairs (VA) obtained all potentially relevant records at the Clackamas County court with respect to civil litigation between E.S. and C.C., who is the contested party in this claim. C.C. has up until this point been deemed to be the valid surviving spouse of the Veteran. Pursuant to the Board's December 2022 remand directives, VA received correspondence from the clerk of the Clackamas County court confirming the entire record had been provided to VA. As such, the Board is satisfied that there has been substantial compliance with its prior remand directives. VA then issued a supplemental statement of the case in April 2023.

The record then indicates E.S. attempted to opt into the modernized appeal system by submitting an April 2023 higher-level review request. VA then issued a May 2023 higher-level review decision. The Board notes that the issuance of this decision appears to have been improper, as higher-level review decisions are not available for simultaneously contested claims. 38 C.F.R. § 3.2601(a). However, E.S. then submitted a VA Form 10182 (Notice of Disagreement) to the Board later in May 2023. As that form was received within the 60-day timeline to opt in a

legacy appeal to the modernized system, it has been docketed in the modernized system and is ready for adjudication.

The record also indicates E.S.'s representative submitted a January 2024 motion to recuse the Veterans Law Judge who conducted the 2008 hearing from further participation in her appeal. As the undersigned Veterans Law Judge is signing the current decision and has not had any participation in this appeal, the Board finds this recusal motion to be moot.

Entitlement to recognition as the Veteran's surviving spouse

After his death, both E.S. and C.C. submitted claims to be considered the Veteran's surviving spouse. However, VA's governing regulations allow for only one person to be considered a surviving spouse. 38 C.F.R. § 3.50(a). For these purposes, a "surviving spouse" means a person who was the spouse of the Veteran at the time of the Veteran's death. 38 C.F.R. § 3.50(b). "Marriage" means a marriage valid under the law of the place where the parties resided at the time of marriage, or the law of the place where the parties resided when the right to benefits accrued. 38 C.F.R. § 3.1(j).

Second, 38 C.F.R. § 3.50(b)(1) requires that a surviving spouse live with the Veteran continuously from the date of marriage to the date of the Veteran's death, except, inter alia, where there was a separation due to the misconduct of the Veteran, without the fault of the spouse. The statement of the surviving spouse as to the reason for the separation will be accepted in the absence of contradictory information. 38 C.F.R. § 3.53(b); see also *Alpough v. Nicholson*, 490 F.3d 1352, 1355 (Fed. Cir. 2007). Temporary separations will not break the continuity of cohabitation. 38 C.F.R. § 3.53(a). Continuity will not be broken where separation was by mutual consent and that parties lived apart for any reason that does not show that the surviving spouse intended to desert the Veteran. *Id*. at (b).

The Veteran and E.S. were married in May 1980. They subsequently had several children but ultimately separated in early 1993. The record indicates they the Veteran then petitioned for divorce, which was denied in a May 1993 order. E.S.

and the Veteran then entered into a consent order in North Carolina in August 1993 that clarified that they had separated in March 1993 and resolved custody issues regarding their children. That order also included an encompassed separation agreement signed by E.S. and the Veteran.

Although no final divorce decree had been issued, the record indicates the Veteran believed that he was divorced from E.S. at that time. He then attempted to marry C.C. in July 1994 in Massachusetts. Shortly before his death, the Veteran obtained a May 1996 divorce decree in Orange County, North Carolina. Unfortunately, he died in July 1996.

As the Veteran's marriage to E.S. had not ended in divorce, death, or annulment at the time of his attempted marriage to C.C. in July 1994, that marriage was void under the laws of the commonwealth of Massachusetts. ALM GL ch. 207, § 4. Although the Veteran's marriage to C.C. was invalid, VA's regulations permit in certain circumstances invalid marriages to be "deemed" valid. VA may "deem" a marriage valid so long as the participants were unaware of the legal impediment at the time they entered into the legally invalid marriage. 38 C.F.R. § 3.52. However, no deemed valid marriages are permitted when a claim has been filed by a legal surviving spouse who has been found entitled to gratuitous death benefits other than accrued monthly benefits covering a period prior to the veteran's death. 38 C.F.R. § 3.52(d).

Looking only at the evidence extent at the time of the Veteran's death, it would appear that C.C. would be a permissible deemed valid surviving spouse and E.S. and the Veteran's marriage had been legally dissolved in divorce. Indeed, VA initially granted C.C. benefits as a deemed valid spouse in December 1996. However, after E.S. submitted her claim for surviving spouse benefits in October 2004, she obtained a November 2008 order from the North Carolina Court of Appeals voiding the May 1996 divorce decree. While viewing the evidence that existed only at the time at the Veteran's death would indicate a facially legally valid divorce decree had terminated this marriage, the Board now finds that it was of no legal consequence due to the posthumous vacatur of that decree.

The Board will now turn to the only question remaining before it of whether the E.S. may be considered the Veteran's surviving spouse, which would in effect preclude C.C. from benefits. As noted above, while a legal marriage (or deemed valid marriage) is a baseline requirement for recognition as a surviving spouse, it is not the only requirement. VA's regulations require continuous cohabitation from the date of marriage through the date of death for this recognition. This requirement is clarified at 38 C.F.R. § 3.53. he first subpart to that regulation clarifies that "[t]emporary separations which ordinarily occur, including those caused for the time being through fault of either party, will not break the continuity of the cohabitation." 38 C.F.R. § 3.53 (a). The determination of whether continuous cohabitation occurred is a finding of fact and a "statement of the surviving spouse as to the reason for the separation will be accepted in the absence of contradictory information." 38 C.F.R. § 3.53 (b). The continuity of cohabitation will not be considered to have been broken when the separation "was by mutual consent and...the parties lived apart for purposes of convenience, health, business, or any other reason which did not show an intent on the part of the surviving spouse to desert the veteran." Id.

In determining whether the appellant satisfies the criteria to be considered a "surviving spouse," the Board looks to the precedential decision of the United States Court of Appeals for the Federal Circuit (Federal Circuit) in *Alpough*. There, the Federal Circuit reiterated that the continuity of cohabitation that is required by the applicable statute and regulation is not broken for the purpose of determining a surviving spouse if there is a separation by mutual agreement of the parties as long as there is no intent to desert by the surviving spouse. *Alpough*, 490 F.3d. at 1358. The Court has also clarified that with questions as to whether there has been a break of continuous cohabitation, the conduct to be analyzed is the conduct that occurred at the time of separation. *Gregory v. Brown*, 5 Vet. App. 108, 112 (1993).

As an initial matter, the Board notes that there is some confusion in the record regarding when the actual separation between E.S. and the Veteran occurred. The consent order entered by the North Carolina District Court in August 1993

adjudged the parties to be legally separated in March 1993, but that document also indicated the initial separation occurred in October 1991 and, after an initial attempt at reconciliation, all marital relations had been terminated in October 1991. That decree was accompanied by a signed separation agreement between the parties but did not give substantial evidence regarding the reason for the separation. No other contemporaneous records from the period around 1993 or before is included in the record.

Since she initiated her appeal more than a decade ago, E.S. has submitted voluminous arguments and statements challenging VA's continued denial of her claim. Her main contention appears to be that the Veteran had undergone cancer treatment that had led to progressive erratic behavior that caused him to fundamentally change. At the April 2008 Board hearing, she testified that this behavior included threats on E.S.'s life and that she was essentially forced due to his decompensated mental state to leave the family home for the safety of her self and her children. At that hearing, E.S. contended that C.C. contributed to the disruption of the marriage and encouraged the Veteran to move to Oregon, which E.S. stated was no her or their psychologist's wish. In response, C.C. submitted a statement in September 2006 challenging E.S.'s characterization of the Veteran's mental state. C.C. stated that the Veteran had been in full control of his mental faculties for their entire marriage and that it was insulting to suggest that he had been mentally incompetent.

Although C.C. has not submitted numerous statements in support of her contentions that she should continue to be recognized as the Veteran's surviving spouse, E.S. has submitted regular and extensive statements and arguments. These statements from E.S. sometimes appear to contain contradictions to earlier evidence. For instance, she submitted a statement received in June 2022 that she was never informed about litigation between herself, her minor children, and C.C. until the Board remanded the matter to obtain documents relating to that suit. However, the Board's review of those records indicates that it was E.S. who brought that suit on behalf of her children against C.C. She also indicated at the hearing in April 2008 that she had never actually gotten divorced from the Veteran

and that they had only separated, but in a June 1997 deposition taken in connection with the litigation between the E.S. and C.C., E.S. agreed under oath that she and the Veteran were no longer married after May 1995. At the time of the April 2008 hearing, the North Carolina Court of Appeals also had not yet voided the May 1996 divorce judgment. Additional other discrepancies appear in the record that somewhat reduce the credibility and probative weight that may be placed on E.S.'s recent statements regarding the nature of the separation between her and the Veteran.

The Board does find, however, that the records from shortly after the Veteran's death as well as the third-party statements submitted in support of E.S.'s appeal do present more clear and probative evidence that appear to support her basic contention that her separation from the Veteran was not due to her intention to desert him.

As explained above, E.S. and C.C. were engaged in litigation shortly after the Veteran's death apparently in relation to royalty payments that the Veteran was owed prior to his death and the handling of those payments and his interest in the same after his death. In the course of that litigation, E.S. attended a June 1997 deposition. She did not describe several of the severely erratic and violent behavior that she reported in more recent statements in support of her appeal. For instance, there was no mention of death threats or the car chase and police involvement that were reported at the Board hearing. However, E.S. did comment on the 80 to 100 gold balls that the Veteran had been making in front of her children that she contends demonstrated his emotional instability. Her representative has provided further elaboration on these and suggests that the Veteran believed he had invented a new way to communicate. These statements were also corroborated by an October 2004 statement from the Veteran's treating oncology nurses that also clarified that the Veteran had over time exhibited increasingly volatile behavior and a desire for more isolation.

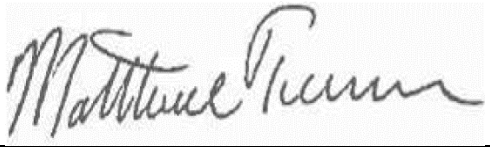
At the June 1997 deposition, E.S. also cited the results of an August 1993 report from psychologist Dr. S. that the children be removed from the home to protect their interests. Notably, the record contains a statement from this psychologist with

a receipt date in September 1996, although it appears that this document may have actually been submitted in October 2004. There, Dr. S. reported that she had begun seeing the Veteran's family in 1987 and that over the course of the Veteran's cancer treatment he had become transformed into a clinically depressed, erratic, and unpredictable individual with verbal and physical abuse of his spouse and a potential danger to the children. Dr. S. indicated that it was actually the Veteran who had left the family in 1993 due to a relationship with another woman, apparently C.C. A similar document from the Veteran's treating oncologist Dr. J.S. was also received at that time that referred to the Veteran's deepening depression and physiatric decompensation that had severe repercussions on E.S. and their children.

The Board finds that this evidence represents substantial support for E.S.'s contention that it was the Veteran's psychological state and the impact that had on their family that caused the separation rather than any intention on E.S.'s part to desert the Veteran. However, the record also contains some evidence submitted by C.C. and in support of her claim which appear to contradict the degree of severity, if any, of the Veteran's emotional dysfunction prior to his death. While Dr. J.S. suggested that the decompensation would continue through the Veteran's life, C.C. provided competent testimony that he was in full mental control of his facilities and stated in September 2006 that it was insulting to suggest he was incompetent. Similarly, although E.S. suggested that the Veteran was a potential threat to her family and that it was recommended that she remove the children from the home, the separation agreement included extended periods where the children were to stay with the Veteran.

Ultimately, although there is not perfect clarity with respect to the circumstances regarding the Veteran's separation from E.S., the preponderance of the evidence suggests that it was either due to the Veteran's worsening psychological symptoms and the effect of those symptoms on his family, or was due to the Veteran's own desire to pursue a relationship with C.C. Neither of those reasons represent an intent to desert the Veteran by E.S. Accordingly, the Board finds that there was no break in the continuous cohabitation between E.S. and the Veteran prior to his

death, as that term is defined in VA's regulations and as interpreted by the Court and the Federal Circuit. E.S.'s appeal is granted.



M. Tenner
Veterans Law Judge
Board of Veterans' Appeals

Attorney for the Board B. Whitelaw, Counsel

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