

TRANSCRIPT OF HEARING
BEFORE
BOARD OF VETERANS' APPEALS
WASHINGTON, D.C. 20420

REGIONAL OFFICE : Nashville, TN

IN THE APPEAL OF : [REDACTED] Frank
[REDACTED]
[REDACTED] Jeannie (Appellant)

DATE : April 26, 2024

REPRESENTED BY : Gordon Graham

MEMBER OF BOARD : Jennifer Kirby, Judge

WITNESS : (None Applicable)



JUDGE: Today is April 26, 2024. This is Veterans Law Judge Jennifer Kirby presiding over the hearing of Jeannie [REDACTED] J-E-A-N-N-I-E; [REDACTED] who is the surviving spouse of Frank [REDACTED]. The VA claim number for this appeal is [REDACTED]. The docket is 200507-87264.

The issue on appeal is whether new and relevant evidence has been received to readjudicate the claim for service connection for the cause of the Veteran's death. The Appellant is represented by Gordan Graham, an accredited VA agent.

Because this hearing is being conducted within the Appeals Modernization Act system, the Board may only consider the evidence that was of record at the time of the April 2020 rating decision and any evidence submitted by the Appellant beginning with today's hearing and ending 90 days from today, which is July 25, 2024.

The Board cannot consider any evidence associated with the record outside those two periods of time. Mrs. [REDACTED] if you'd please raise your right hand?

(OATH ADMINISTERED)

JUDGE: Thank you very much. Mr. Graham you may proceed.

MR. GRAHAM: Okay. Thank you, Your Honor. Ms. [REDACTED] feel she's competent to testify under oath as to what came to her by the five senses during her marriage. And she's credible inasmuch as Mr. [REDACTED] would have no reason to fabricate a story in 1982 about when he began or ended his cigarette smoking fully 33 years before contracting lung cancer.

It's almost inconceivable, so we feel that her testimony is going to be very probative. I'm aware that there is legislation pending a motion before the Board chairman currently to start letting you and other Veterans Law Judges that conduct hearings be designated the trier of fact in the case of the appeal.

And if at all possible, Ms. [REDACTED] would ask you to adjudicate this appeal. I'm not sure that's possible but we thought we'd throw that out there for you.

JUDGE: Thank you.

MR. GRAHAM: I'd like to have the Judge the old-fashioned way. I've been doing this for 35 years and I always loved Legacy hearings face-to-face and I'd travel to the city for that particular reason. I'm not real fond of these video things. Anyway, these questions are for you, Ms. [REDACTED] Do you have any medical training whatsoever?

MRS. [REDACTED] None other than taking care of family.

MR. GRAHAM: That's what I needed to know. You're not a medical expert, so anything that you offer testimony regarding Mr. [REDACTED]' medical condition would be predicated on what you observe, rather than what you know as a doctor, or a nurse. I just wanted to establish that.

MRS. [REDACTED] Yes.

MR. GRAHAM: Would you explain to the Judge your understanding what Frank stated he began smoking and the reason for why he quit?

MRS. [REDACTED] Well, he always told me that when he went outside to smoke a cigarette, he'd say this is stupid and I'm not going to do this anymore. It was about the same time after his daughter was born in '62. He never smoked or had anything to do with any of it the whole time we were together.

MR. GRAHAM: So, you're essentially saying this confirms what his pulmonologist, Dr. Hernandez Kuno said in 2020 when he supplied you with that quasi-independent medical opinion regarding when he quit smoking.

I think Dr. Kuno mentioned that he quit five to seven years later after leaving the service over 50 years ago, fully 30 years before he passed away. So, that puts that date somewhere in the '62 to '64 region. Do you agree with that?

MRS. [REDACTED] Yes, that's correct.

MR. GRAHAM: Good. Did you ever see him smoke or chew tobacco in the 30 years of your marriage?

MRS. [REDACTED] No, never.

MR. GRAHAM: Okay. Why don't you explain to the Judge how you first met him, just to familiarize yourself with how you all got together?

MRS. [REDACTED] Well, all my family has been in the grocery business forever. He had a store in Nashville downtown and I went and applied for a job with him and went to work for him and that's how we first met.

MR. [REDACTED] What was he doing for a living when you met him?

MRS. BATES: He owned a grocery store.

MR. GRAHAM: Yeah, but was it just as an administrative job, or did he actually work in his own store?

MRS. [REDACTED] Oh, no, he was the meat cutter. He worked in the store.

MR. GRAHAM: So, to your knowledge, he was pretty much occupied in that occupation from the time he left service?

MRS. [REDACTED] Absolutely. But he was also, he worked at the warehouses, a president and CEO at some time, and chairman of the board.

MR. GRAHAM: Okay. From where I'm looking at it, I don't see it, but from your experience in this business, is it possible to smoke while you're cutting meat?

MRS. [REDACTED] No.

MR. GRAHAM: Okay. By the time you met him, he definitely quit smoking. You can testify to that.

MRS. [REDACTED] Yeah, he didn't care for it at all after he had quit.

MR. GRAHAM: Were you aware of any extraordinary chemical exposures that he might have been exposed to in the course of his work during your marriage?

MRS. [REDACTED] No, none that I know of.

MR. GRAHAM: He wasn't exposed to any inordinate amount of dust or other pollutants in the store there?

MRS. [REDACTED]: No.

MR. GRAHAM: Okay. And he didn't engage in any recreational pastimes that might have exposed him to a toxic chemical that could cause his cancer, to your knowledge?

MRS. [REDACTED] Not unless bowling is toxic.

JUDGE: I'm sorry, Mrs. Bates, what did you say was not toxic?

MRS. [REDACTED]: The only thing he did was bowling.

JUDGE: Bowling, okay.

MR. GRAHAM: On July 7, I believe it was, 2015, after he had an initial diagnosis of lung cancer, did you go up to Nashville -- well, if you are in Nashville -- you met with this Dr. Jonathan Nesbitt from Vanderbilt University Hospital there in Nashville?

MRS. [REDACTED]: Yes, I attended all doctor appointments with Frank and I usually had to drive, so I was at all of them.

MR. GRAHAM: Okay. I know from looking at that report that Dr. Nesbitt stated in the social history, and I'll discuss that with the Judge later, that Frank reported he smoked three packs a day until '75.

There seems to be a pretty major disparity between 1962, '64 area, and '75. That's a vast difference in number of years. Did Frank say something to that effect to Dr. Nesbitt, to your knowledge?

MRS. [REDACTED] No, not to my knowledge. I don't know where he got that number from. I have no idea.

MR. GRAHAM: Another doctor later on two years after Frank died, the VA commissioned an independent medical opinion from a VA doctor, Dr. Kenton Dodd. It's a matter of record in VBMS. Dr. Dodd elaborated further and even added to that diagnosis that he smoked heavily.

You never heard Dr. Nesbitt or Frank mention that he smoked heavily, so do you have any idea where Dr. Dodd could have come up with this improved version of a medical opinion regarding his smoking?

MRS. [REDACTED] No, I don't have any idea. I don't even know who he is.

MR. GRAHAM: So, you never met him? You never had any contact with him, or talked to him?

MRS. [REDACTED]: No.

MR. GRAHAM: Okay. So, you can't think of any risk or risk activity, other than his Camp Lejeune contaminated water exposure, during the pendency of your marriage that might have caused this cancer, is that correct?

MRS. [REDACTED] No, there's nothing else.

MR. GRAHAM: Was Frank in good health up to the time he was diagnosed with cancer?

MRS. [REDACTED]: Well, he ran the grocery store until he was 73. After that, he started going to the senior citizens and he exercised every day at the senior citizen center. So, he stayed in great shape. If a doctor told him to do something, he was very diligent about doing it.

MR. GRAHAM: So, at the end when Frank was on hospice, did he need help in accomplishing activities of everyday living? For example, toileting, bathing, getting dressed, remembering to take his medications?

MRS. [REDACTED] Well, he needed help before he went on hospice. I had taken him out one day to visit people and by the time I got him home, he couldn't hardly even get in the house. Luckily, I had left his rollator near the back door and he sat down.

That was the last day that he walked. From then on, I had to take care of him. I finally had to get some help because he was a big man. He was six-one and it was just hard. His legs would

just twist and you couldn't do anything much with him.

MR. GRAHAM: Okay. That concludes my questions for Mrs. [REDACTED] at the moment, which is not to say I might not come back and pester her again, Your Honor. I don't have a JD, as you well know, and I got all my legal training from Judge Judy, you know. Occam's razor theory, so bear with me if I seem a little simple minded in this respect.

I'm worried because I've reviewed the claims file in extensive detail and longitudinally, and I'm seeing it appears as though Dr. Dodds has copied and pasted Dr. Nesbitt's social history observation regarding the Veteran's smoking history and even elaborated a little bit on there and indicated he smoked heavily. This is two years post mortem, so I question how probative that is based on second-hand information.

JUDGE: So, are you asserting that the opinion from Dr. Dodd is inadequate?

MR. GRAHAM: I'm implying that it's a little bit less than probative and I'm getting ready to discuss that in much, much more detail, if it's okay with you?

JUDGE: Yes.

MR. GRAHAM: If you base it on the fact that it's somewhat hearsay, what disturbs me a little bit more is that the whole gist of his IMO focuses entirely on lung cancer due to cigarette smoking in the general population but makes no observations why Veterans population of smokers also exposed to contaminated water would be an item he might discuss in his independent medical opinion.

This focuses entirely on the cigarette smoking cohort of people and doesn't even involve the comorbidity of exposure to the Camp Lejeune water. In fact, I took a quote out of his IMO. It said current medical evidence would not strongly implicate his water exposure as a risk factor.

And, Your Honor, that's not a very explicit or equivocal -- it's a very equivocal statement, rather than unequivocal. I think he'd have a hard time measuring that against another opinion because it isn't couched in terms of more likely, less likely, at least as likely as not.

I think he discounted the Camp Lejeune without even addressing it personally because that was the only sentence I could find in his whole independent medical opinion that even discussed Camp Lejeune. It's not quantifiable.

I did another thing and I thought to myself, I smoked while I was in Vietnam. I can understand this, but three packs a day, if you're awake, and most of us were from about 5:00 AM until 9:00 PM, if we got eight hours of sleep.

If we were vertical for 16 hours and there's 60 minutes per hour, it's a limited amount of time divided by 60 cigarettes per day based on three packs per day habit. You'd have a cigarette in your mouth virtually every 14 minutes and I don't know how you can work.

Mr. [REDACTED] was a radio telegraph operator according to his DD214 and that requires a free hand for telegraph key for Morse code and/or microphone work. I just don't see how he could accomplish this with a cigarette in his mouth virtually nonstop.

We were also allowed 30 minutes for every meal we had and that subtracts another 90 minutes from that 16 hours that you're awake. That would drive that number of minutes down even lower per cigarette.

I believe Dr. Dodds medical opinion is inadequate because his rationale is based solely on medical literature and that's pointed out in his opinion. Bailey versus O'Rourke says if you try to rely on that opinion as probative evidence of a lack of a nexus element in service connection, I think it erred.

I don't think it has any probative value personally. That's just my opinion. That's a matter for the trier of fact to determine. I don't think his opinion supported its conclusion. I can't find a single cite to peer reviewed medical articles that would support the correlation that it's purely a tobacco issue to the complete exclusion of Camp Lejeune having some basis in fact of possibility of it being the etiology of this.

Dennis versus Nicholson, citing Abernathy, the Court's long-held just listing all that evidence before stating his conclusion. It doesn't constitute an adequate statement or reasons and bases for how he arrived at his decision.

It doesn't have that cache of respectability in terms of medical opinions in my book. I think it's conclusory and at best, it's based on hearsay of what Dr. Nesbitt said, Your Honor. He's just really relaying what he's reading, rather than coming to some conclusion predicated on his medical knowledge to support his decision.

I won't dwell on that. I don't believe that there's enough well-articulated, sound reasoning as in Nieves-Rodriguez vs. Peake that would support his thesis, his theory. It's just not well formulated. Notwithstanding that, Ms. [REDACTED] obtained several medical opinions.

One from Dr. Kohl, who's the Veteran's treating physician. He's considered credible. He submitted an opinion in there on April 20, 2020 in VBMS. He stated it was at least as likely as not that his cancer was caused by contamination of the chemicals.

But again, Dr. Kohl's reasoning, as well as Dr. Kuno, his pulmonologist, they're both a masterpiece of understatement, so to speak. They're very brief. They're not conclusory. At least they gave some evidence but they weren't predicated certainly on a complete review of the claims file from stem to stern.

So, I know they lack some probative value, but I think they're not completely worthless based

on Monzingo versus Shinseki. I think that there's some value, some probative weight that can be extracted from them. I don't believe they're just somebody shooting from the hip.

Because both of them were treating physicians and I know you guys don't treat treating physician testimony as being much higher value perhaps than medical opinion. Anyway, for that reason, I believe that my new opinion from Dr. Baker, which I'll be submitting to you -- I'm not going to go into it in great detail.

But he has 27 peer reviewed sites and lists a lot of information regarding chemical exposure. He's a toxicologist, which is very probative in terms of why his opinion has great value. As I said, I don't want to touch on that because that would just waste your time and you're going to have an opportunity to read it, or whoever decides the case will.

But most appropriately, I think that Dr. Dodd didn't even investigate Combee versus Brown on a direct basis. He never addressed it and that's another reason why I believe it's not very probative.

Because if you don't study all the different facets of why somebody contracted a disease, or why they died from it, you can't assign any value, be it this is probably it, this might be it, this could have caused it, and whatnot.

It doesn't give us any background to decide which possible etiology is the most probative, or the most probable. That is the essence of my argument and I also ask under Bryant versus Shinseki if there's anything you can add? We're on all fours here.

JUDGE: So, I'm glad that you brought up the Combee case because one of the things that I noticed when I was reviewing the file is that when Mrs. [REDACTED] -- and I know you're going to send in your post-hearing brief that's going to talk a little bit about the procedural history of the entire claim going all the way back to the Veteran's passing.

But one of the things that I noticed in May 2018 that Mrs. [REDACTED] raised a contention, and it's important for us to address contentions, is that there was a list that VA provided about whether conditions are presumptive to Camp Lejeune.

So, I just want to be clear that there is a list of conditions that are presumptive for service connection for compensation. And then there's a separate list of conditions if you had a qualifying service at Camp Lejeune Veteran family member. And those conditions developed that you're eligible for healthcare benefits. And that's not the same as compensation.

And so, Combee is the case that basically says if something isn't presumptive, yet the evidence still establishes it's related to some kind of exposure -- Camp Lejeune, herbicides, that kind of thing -- that you can still get service connection even if it's not on the list if the evidence shows that they're connected.

And that's, I think, what we're talking about today is you believe it's connected to the Camp Lejeune water. Whether it's on the list or not, that's your contention. Combee is the case that sort of lets us say okay, well if it's not on the presumptive list, then we don't just automatically say no.

We look at the rest of the evidence to see if there actually is a connection, and that's what you're contending. As for the additional opinions, in the context of Bryant, I want to be clear that they are absolutely relevant to this issue, to this appeal. The diagnosis of lung cancer and the service at Lejeune are not in dispute, so really the question is nexus.

So, any opinions that you do have are certainly relevant and should be submitted. I also want to reiterate that because this case was opted in to the Appeals Modernization Act system from the April 6, 2020 Statement of the Case, the April 6, 2020 Statement of the Case is when the record closed.

Anything that was submitted after that before today that's relevant, it can't be considered by the Board unless it's resubmitted.

MR. GRAHAM: May I, Your Honor? It touches on 3.156B because the evidence she submitted from the two doctors, Dr. Cole and Dr. Hernandez Kuno, that would be 3156B evidence under the Legacy system because it was submitted.

I don't have the timestamp on those documents but was the AMA opt-in signed two minutes after the 3.156B evidence of the two doctors' testimonies, would that not make it admissible prior to the opt-in to the AMA? It makes it a matter of first impression.

JUDGE: The 10182 is the opt-in. It was treated as the opt-in because it came from a Legacy document. And it actually has the box checked that says that it opted into from the SOC.

MRS. [REDACTED] Right, I understand that part.

JUDGE: So, what I'm saying is that the rules of the AMA, the Statement of the Case is what closes the evidence window. It's not a rating decision, right? Because you're opting in from the SOC. So, the evidence window closed with the SOC.

So, if there's anything -- all I'm saying is that if you feel that there's any other evidence that might potentially not have been considered in the SOC or prior, that it would be worth resubmitting. Particularly when we're discussing that element of nexus.

MR. GRAHAM: Well, I'm looking at VBMS here and the two doctors' testimonies were submitted, that's an item right above correspondence, the next one after that is 4138, last but not least the 10182. I would think that would be the 10182 submission would automatically cut the record off at that point, so to speak.

Everything prior to the 10182 is still part of Legacy. Doesn't work that way?

JUDGE: No, but when you opt-in to the AMA from Legacy, the SOC, which is what happened in this case, the record cuts off at the SOC.

MR. GRAHAM: Oh, okay.

JUDGE: If the evidence, if you were not in the hearing docket, if you were in the evidence submission docket, then evidence submitted with the 10182 would be part of the 90 days following the 10182. But because it's the hearing docket, that last 90 days begins today.

MR. GRAHAM: Okay. I think I might put that in my argument simply because 3.156B is unequivocal as anything that's submitted during the pendency of the appeal. And I see that the Form 9 was submitted on 4/6/20, which would put that evidence in part of Legacy prior to the submission of the 10182.

JUDGE: The Form 9 that was received on April 6, 2020?

MR. GRAHAM: Yes, ma'am.

JUDGE: It's blank.

MR. GRAHAM: Excuse me, the Statement of the Case. The Form 9 went in on -- yes, Form 9 is right above the SOC of 4/6/2020. Let me open that up and I'll tell you what it's dated as. But it definitely preceded the 10182. Oh, excuse me. That's a blank form.

JUDGE: Yes, sir.

MR. GRAHAM: I didn't see that. I just saw the fact that it was a matter of record. Well, that

changes a few things in my argument. Well, I'll revise my legal brief. I apologize.

JUDGE: Yes, sir. No, and that's part of the reason why we have the 90 days following the hearing. I certainly appreciate legal briefs if for no other reason than it sort of is a good summary of what we discussed today. And it gives you the opportunity to cite to all of those.

Gosh, sometimes the transcript isn't perfect and the transcriber is doing the best that they can. But this way, you can list all of the cases that you cited because you did cite quite a few, including Nieves-Rodriguez, which is, of course, one of the more relevant cases when we're talking about the probative value of opinions.

MR. GRAHAM: I don't mean to interrupt, but I didn't entertain the argument about the NOC documents and the separate civilian law suit under Camp Lejeune. And I was fully aware that lung cancer was on that list but it's not on the 3.309F list in the 38 CFR.

So, I didn't figure it would make any difference to argue that. Wouldn't make any sense to waste my time arguing it because it's not on the list. I prefer to pursue the Combee on a direct basis on 3.303AD because I believe that's the pathway to cause of death, personally.

JUDGE: Okay. All right.

Right about here is when I knew Jeannie had won. When she said "I enjoyed engaging with you today, sir." I knew we had it in the bag.

MR. GRAHAM: And that's all of my argument, Your Honor.

JUDGE: Well, that is also the conclusion of my questions. I appreciate your representation of the Appellant today very much. I enjoyed engaging with you, sir.

MR. GRAHAM: I thought I'd met all the Judges but then you guys went and hired about another 135 of them. I usually end up with all the old guys like John Hager and Mike Skaltsounis. But I'm meeting new ones every day now.

I just had Evan Deichert last couple weeks ago. I don't think I've ever had Alexandra Simpson before. I think she's always been a staff attorney the whole time I knew that she was up there.

JUDGE: Yeah, we're growing in the Judge corps. I think that's safe to say. But I will thank you for your representation. I look forward and the Board looks forward to receiving your post-hearing brief, sir. Mrs. [REDACTED]

MR. GRAHAM: I'll submit a 5103 with that to signify that we don't have anything else to submit when I submit that. And I'm also submitting a statement from Ms. [REDACTED] regarding some of the things we discussed today just to underline what we testified to.

JUDGE: Okay, that sounds good. Thank you. Mrs. [REDACTED], thank you again for taking the time to meet with me today and for your patience in waiting for the hearing. Obviously, it's been quite some time since your appeal was filed.

And I appreciate your patience and also your willingness to take time to meet with me on a Friday afternoon. I also want to thank you for your support of the Veteran and for his service to our nation and everything that he sacrificed as a result. Please know that you have my thanks.

MRS. [REDACTED]: Thank you.

JUDGE: And on that note, I will close the hearing and we will go off the record.

(HEARING ADJOURNED)