

1 UNITED STATES COURT OF VETERANS APPEALS

2 No. 93-517

3 MARY S. TURNER, APPELLANT,

4 v.

5 JESSE BROWN,  
6 SECRETARY OF VETERANS AFFAIRS, APPELLEE.

7 On Appeal from the Board of Veterans' Appeals

8 (Decided February 24, 1994 )

9 *Mary S. Turner, pro se.*

10 *Mary Lou Keener*, General Counsel, *Norman G. Cooper*, Assistant General Counsel, *Thomas*  
11 *A. McLaughlin*, Deputy Assistant General Counsel, and *Rosalind E. Masciola* were on the brief for  
12 appellee.

13 Before NEBEKER, *Chief Judge*, and KRAMER and HOLDAWAY, *Judges*.

14 HOLDAWAY, *Judge*: Appellant, Mary S. Turner, appeals a February 11, 1993, decision of  
15 the Board of Veterans' Appeals (BVA or Board) which denied service connection for the cause of  
16 the veteran's death. The Court will affirm the decision of the BVA.

17 **BACKGROUND**

18 Appellant is the widow of the veteran, Robert A. Turner. The veteran had active service from  
19 July 1941 to May 1961. His induction examination, reenlistment examinations, and retirement  
20 physical reflect no significant abnormalities. His service medical records (SMRs) indicate that he  
21 complained of back pain in February and March 1954. He was advised to apply Infra Red to the  
22 area, and no other complaints of back pain are recorded. However, the veteran's SMRs are silent as  
23 to any evidence of kidney disease, cardiovascular disease, or hypertension. Although the veteran  
24 noted sugar in his urine in an August 1964 Report of Medical History, his urinalysis was reported  
25 as normal, as was his genitourinary system.

26 In July 1972, the veteran filed an application for compensation or pension, indicating he had  
27 experienced chronic kidney failure in April 1972 and nephrotic syndrome in December 1969. In  
28 support of his claim he submitted hospitalization records from Peter Bent Brigham Hospital, a  
29 private hospital, and a letter from Dr. Lazarus, a private physician. The hospital records indicate that  
30 the veteran had experienced chronic renal disease which was first treated in 1969. Dr. Lazarus stated

1 that "Mr. Turner gave a history of proteinuria in 1941 while in the U. S. Navy," and that the veteran's  
2 present illness was probably related to proteinuria manifested in the 1940s. In July 1974, the Board  
3 denied service connection for chronic renal disease.

4 In January 1980, the veteran filed a claim for service connection for oropharyngeal cancer,  
5 which he claimed was a result of exposure to radiation during service. Private medical records  
6 reflect that the veteran underwent a repeat electrocoagulation and excision of a recurrent tumor in  
7 the left base of the tongue extending to the tonsillar fossa in May 1977. The veteran's tumor recurred  
8 in June 1978, and he underwent radiation therapy at that time. In October 1978, the veteran was  
9 asymptomatic, and there was no evidence of recurrence.

10 On July 25, 1982, the veteran died. The death certificate lists the immediate cause of death  
11 as cardiac arrest, due to or as a consequence of myocardial infarction and coronary artery disease.  
12 Chronic renal failure was listed as a significant condition contributing to death. In August 1982,  
13 appellant filed a claim for dependency and indemnity compensation. In August 1982, the Regional  
14 Office (RO) denied service connection for the cause of the veteran's death since the Board had  
15 previously denied service connection for renal disease, and there was no evidence of coronary  
16 disease during service. Appellant and the veteran's daughter testified at personal hearings held in  
17 August 1983 and July 1984. Appellant testified that the veteran complained of symptomatology  
18 attributable to renal disease during service, and that his SMRs had been altered so that the veteran  
19 could remain in the service. The veteran's daughter, a registered nurse, testified that the veteran had  
20 died five years after his cancer was manifested, and that this was the normal life expectancy of  
21 someone with oropharyngeal cancer. In July 1985, the Board denied service connection for the cause  
22 of the veteran's death.

23 In September 1988, appellant requested her claim be reopened under the Radiation Exposed  
24 Veterans Compensation Act of 1988. In January 1989, her claim was denied by the RO. In May  
25 1989, appellant opined at another personal hearing that the veteran had cancer when he died and that  
26 she was, therefore, entitled to service connection for cause of death. In July 1989, the hearing officer  
27 denied appellant's claim. In August 1989, appellant filed a VA Form 1-9 (Appeal to the Board).

28 In September 1989, appellant submitted a letter from Dr. Strom, a private physician. Dr.  
29 Strom stated his view that the veteran's renal disease developed slowly over time, beginning during  
30 service. Furthermore, Dr. Strom opined that the veteran's oropharyngeal cancer was a contributing  
31 cause of death. In November 1989, Dr. Strom testified before a traveling section of the Board. Dr.  
32 Strom testified that he had treated the veteran for many years, beginning in 1973. He further testified  
33 that the veteran had related to him a history of proteinuria and high blood pressure during service  
34 which would have been consistent with his development of chronic renal disease years later. Dr.  
35 Strom speculated that the veteran's SMRs had been purged of any indication of these diseases so that

1 the veteran could remain in the service. Dr. Strom also explained that persons suffering from  
2 chronic renal disease often develop cardiovascular disease as a result of high blood pressure, and that  
3 the veteran's cardiovascular system was additionally affected by the stress he experienced when he  
4 was informed that his cancer had recurred.

5 In June 1990, the Board determined that appellant's newly submitted evidence did not  
6 establish a new factual basis to grant her claim. Appellant appealed this decision to the Court. On  
7 August 27, 1991, the Court vacated and remanded the Board's June 1990 decision for the BVA to  
8 reconsider whether the veteran's cancer was subject to presumptive service connection on the basis  
9 of his participation in a radiation-risk activity during service. In January 1992, the Board conceded  
10 that the veteran's cancer was service connected and it remanded appellant's claim to the RO to obtain  
11 an expert medical opinion from a specialist in radiation oncology. In July 1992, Dr. Willett, the  
12 Chief of the Radiation Therapy Service of the VA Medical Center in Boston, Massachusetts,  
13 submitted his opinion. Dr. Willett determined:

14 The radiation treatment [for cancer] did include the carotid arteries, both right and  
15 left (arteries in the neck), but the heart and arteries in the heart and adjacent to the  
16 heart did not receive any radiation. A direct effect of radiation therapy given for  
17 cancer of the oropharynx upon the coronary blood vessels is not possible. Indirect  
18 affects [sic] upon the heart vessels and other arteries from anxiety and stress, causing  
19 arteriosclerosis and atheromatous occlusive disease, is speculative, and in this  
20 [veteran's] case, acute anxiety in relation to his tonsillar cancer should not have lasted  
21 any longer than eighteen months, the period of time between the diagnosis of the  
22 cancer of the tonsil and final radiation treatment for the recurrence.

23 In response to Dr. Willett's opinion, Dr. Strom submitted a letter in October 1992, in which he  
24 reiterated that stress associated with the veteran's cancer contributed to his death. On February 11,  
25 1993, the Board denied service connection for the cause of the veteran's death.

### 26 ANALYSIS

27 The Board's denial of service connection for cause of death is a factual determination. *Swann*  
28 *v. Brown*, 5 Vet.App. 229, 232 (1993), *Wood v. Derwinski*, 1 Vet.App. 190, 192 (1991). Pursuant  
29 to 38 U.S.C. § 7261(a)(4), and the Court's decision in *Gilbert v. Derwinski*, 1 Vet.App. 49 (1990),  
30 the Court must affirm findings of fact made by the Board unless they are found to be "clearly  
31 erroneous." In determining whether a finding is clearly erroneous, "this Court is not permitted to  
32 substitute its own judgment for that of the BVA on issues of material fact; if there is a 'plausible'  
33 basis in the record for the factual determinations of the BVA . . . we cannot overturn them." *Gilbert*,  
34 1 Vet.App. at 53.

35 Although chronic renal disease is listed as a significant cause of death on the veteran's death  
36 certificate, there is no direct evidence linking the veteran's renal disease with service. The veteran's  
37 SMRs consistently report normal urinalyses and blood pressure levels, as do medical records dated

1 shortly after separation from service. The earliest clinical records indicating the incurrence of renal  
2 disease and cardiovascular disease are dated many years after service. Although Dr. Strom opined  
3 that the veteran's renal disease should have been service connected based on a history of proteinuria  
4 in service, this medical history, supplied to Dr. Strom by the veteran, was previously rejected by the  
5 BVA on the basis that all SMRs were negative for such a condition. A medical opinion based on  
6 a previously rejected factual predicate has no probative value. *See Reonal v. Brown*, 5 Vet.App. 458,  
7 460-61 (1993); *Guimond v. Brown*, 6 Vet.App. 69, 72 (1993) Therefore, the BVA had a plausible  
8 basis for rejecting Dr. Strom's opinion with respect to this issue. It is apparent, therefore, that the  
9 Board, which cited and analyzed all the relevant facts in its excellent and thorough decision had an  
10 eminently plausible basis for rejecting Dr. Strom's opinion.

11 The same is true as to the claim that the service-connected cancer was a cause of death.  
12 There is no evidence, other than the daughter's testimony, that the veteran's cancer was itself the  
13 cause of his death. Specifically, the veteran's death certificate does not list cancer as a cause of  
14 death, the veteran's medical records indicate that his cancer did not recur, and neither the VA's  
15 medical expert nor appellant's medical expert stated that appellant's death was a result of cancer.  
16 Furthermore, an independent medical expert, Dr. Willett, could not determine the effect, if any, stress  
17 associated with cancer had on the veteran's death. Additionally, Dr. Willett determined that radiation  
18 therapy to the veteran's neck did not damage the blood vessels in and around the heart to produce  
19 fatal cardiovascular disease. The Court finds the Board's decision rejecting cancer as a cause of  
20 death to be plausible.

21 The February 11, 1993, decision of the Board is AFFIRMED.