

UNITED STATES COURT OF VETERANS APPEALS

No. 91-912

ODESSA GREGORY

Appellant,

v.

VA File No. XC 8-666-314

EDWARD J. DERWINSKI,
Secretary of Veterans Affairs,

Appellee.

Before: NEBEKER, chief Judge, and KRAMER, and STEINBERG,
Associate Judges.

O R D E R

In order for a spouse of a veteran to qualify for dependency and indemnity compensation (DIC) as the surviving spouse, 38 U.S.C. § 101(3) (1988) requires, in part, that the veteran and the spouse live continuously with each other from the date of marriage to the date of the veteran's death "except where there was a separation which was due to the misconduct of, or procured by, the veteran without the fault of the spouse"

However, 38 C.F.R. § 3.53(a) (1991) states, in relevant part, that "the requirement that there must be continuous cohabitation from the date of marriage to the date of death of the veteran will be considered as having been met when the evidence shows that *there was no separation due to the fault of the surviving spouse*" (emphasis added). Thus, in order for a spouse to qualify as a surviving spouse, the regulation requires only that the spouse not be at fault in causing the separation. It does not also require, unlike 38 U.S.C. § 101(3), that the veteran's misconduct has caused the separation or that the separation be procured by the veteran.

Therefore, in light of the above, it is

ORDERED that the Secretary file a brief, within 30 days of the date of this order, on the issues of:

(1) Whether 38 C.F.R. § 3.53(a) is in conflict with 38 U.S.C. § 101(3), as quoted above, by not requiring that the separation be caused by the veteran's misconduct or be procured by the veteran.

(2) Whether there is evidence in the record to support a determination of fault on a basis other than the

Board of Veterans' Appeals' conclusion that because
appellant

sought termination of the marriage and did not
reconcile with the veteran, she was *therefore* not free
of fault.

The appellant may file a response to the Secretary's brief within
30 days after it is filed and served.

DATED: April 13, 1992 PER CURIAM