

**IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS**

PATRICIA C. MURPHY,)	
Appellant,)	
)	
v.)	Vet.App. No. 15-1494
)	
ROBERT A. McDONALD,)	
Secretary of Veterans Affairs,)	
Appellee.)	

JOINT MOTION FOR REMAND

Pursuant to U.S. Vet.App. R. 27(a) and 45(g)(2), the parties respectfully move the Court to vacate the Board of Veterans' Appeals (Board) March 25, 2015, decision that denied Appellant's claim of entitlement to accrued benefits for a surviving spouse. (Record Before the Agency (R.) at 2-12).

BASIS FOR REMAND

The parties agree that vacatur and remand are warranted because the Board erred when it did not consider VA's existing policy as it pertained to substitution of claimants. See 38 U.S.C. § 5121A (effective October 10, 2008); 38 C.F.R. § 3.1010 (effective October 6, 2014).

Specifically, in the introduction of its decision, the Board discussed an amendment of the laws that "permit[s] substitution of claimants when the original claimant dies during the pendency of the claim or appeal," noting that the Veteran's claim was still pending at the date of his death - March 10, 2012. (R. at 3-4 (2-12), 1146 (certificate of death)). The Veteran was (1) awarded service connection for coronary heart disease (rated at 100%, effective August 31, 2010)

and Dependents' Educational Assistance (also effective August 31, 2010) and (2) denied other benefits in a September 11, 2011 VA rating decision. (R. at 1160-77). He was informed by VA that he had one year, until September 14, 2012, which is the date of notice of the rating decision, to submit a notice of disagreement (NOD) if he did not agree with the decision. (R. at 1166 (1160-77)). The Veteran passed away on March 10, 2012, during the pendency of the time period in which to file the NOD. (R. at 1146).

Appellant, who VA has acknowledged is the surviving spouse of the Veteran, John Joseph Murphy, Jr. (R. at 1119-22, 1136-39 (May 2012 VA rating decision)), submitted an Application for Dependency and Indemnity Compensation, Death Pension and Accrued Benefits by a Surviving Spouse or Child – VA Form 21-534 – prior to expiration of the one-year deadline, in April 2012, specifically requesting that VA inform her as to what benefits she could receive.¹ (R. at 1128-35). VA, however, did not consider her application as one of substitution, only an application for accrued benefits.

The Court in *Reliford v. McDonald* explained based on VA's own internal procedures – VA Fast Letter 10-30 (Aug. 10, 2010) – that “receipt of a VA Form 21-534 will be accepted as both a claim for accrued benefits **and a substitution**

¹ In her application, Appellant stated, “My husband was 100% disabled [and] received compensation since last fall.” (R. at 1135 (1128-35)). She asked VA, “[W]ill I, as his surviving spouse of 56 years, be eligible to receive a part of this? Please let me know, as he did not include me in survivor's benefits as a widow. Thank you. I saw nothing about disability compensation in any of the above questions.” (R. at 1135).

request.” 27 Vet.App. 297, 303 (2015) (emphasis added); see also 38 C.F.R. § 3.1010 (2015); M21-1MR, Part VIII, Chapter 2 – Substitution in Case of Death of Claimant. The Court also explained that VA’s established procedures called for notice and waiver provisions. *Id.* Here, however, the Board did not consider whether Appellant received appropriate notice or whether she was entitled to be substituted in her husband’s claim, which it acknowledged was still pending at the time that Appellant filed VA Form 21-534. (R. at 9 (1-12)). Given the Board’s failure to address whether Appellant had been given proper notice of substitution, as well as whether her application was considered for substitution, vacatur and remand are warranted for the Board to consider the Court’s holding in *Reliford*, which was decided prior to the Board’s decision on appeal.

CONCLUSION

Therefore, the parties request that the Court vacate the Board decision and remand for readjudication consistent with the legal theories discussed above. Upon remand, Appellant may submit additional evidence on the issues, and the Board may “seek any other evidence it feels is necessary” to the timely resolution of Appellant’s claim. *Kutscherousky v. West*, 12 Vet.App. 369 (1999). On remand the Board must ensure compliance with all relevant provisions of 38 U.S.C. §§ 5103, 5103A and 38 C.F.R. § 3.159. See *Pelegriani v. Principi*, 18 Vet.App. 112 (2004); *Nolen v. Gober*, 14 Vet.App. 183 (2000) (per curiam order). Further, the Board must “reexamine the evidence of record, seek any other evidence the Board feels is necessary, and issue a timely, well[]supported

decision in this case.” *Fletcher v. Derwinski*, 1 Vet.App. 394, 397 (1991). In any subsequent decision, the Board shall provide an adequate statement of reasons or bases for its decision on all material issues of fact and law. See 38 U.S.C. §7104(d)(1); *Gilbert v. Derwinski*, 1 Vet.App. 49 (1990). The Secretary “shall take such actions as may be necessary to provide for the expeditious treatment” of this claim. 38 U.S.C. § 7112. Finally, the Board shall incorporate copies of this motion and the Court’s order granting it into the claims folder for consideration in subsequent decisions on these matters. The Parties respectfully request that the Court expressly incorporate the terms of this motion into the order, and that the Court remand this appeal for further action consistent with the foregoing. See *Forcier v. Nicholson*, 19 Vet. App 414, 425 (2006), *affirmed* 221 Fed. Appx. 996, 2007 U.S. App. LEXIS 8738 (Fed. Cir. 2007)(“The duty to ensure compliance 'personally' arises when the Secretary agrees to the specific terms of a motion for remand, and, based upon his position as "the head of the Department," he can be held accountable for this responsibility.”)

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