

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

ANNABEL S. ALLEN,)	
)	
Appellant,)	
)	
v.)	Vet. App. No. 15-2163
)	
ROBERT A. McDONALD,)	
Secretary of Veterans Affairs,)	
)	
Appellee .)	

JOINT MOTION FOR PARTIAL REMAND

Pursuant to Rules 27(a) and (c), and 45(g) of the Court’s Rules of Practice and Procedure, the parties respectfully move the Court for an order partially vacating and remanding the February 3, 2015, Board of Veterans’ Appeals (Board) decision that dismissed Appellant’s claim of entitlement to an earlier effective date than June 1989, for the assignment of a 100 percent schedular evaluation for the Veteran’s service-connected psychiatric disorder, with anxiety reaction and depression, on the basis of clear and unmistakable error (CUE) in an April 1992 rating decision on an accrued benefits basis. (Record (R.) at 1-14).

The parties do not contest the Board’s dismissal in a separate decision of Appellant’s motions for revision of prior Board decisions in June 1989 and January 1992 on the basis of CUE and its referral of an inferred claim for Special Monthly Compensation based on Aid and Attendance (SMC). (R. at 40-44; 2-3).

BASES FOR REMAND

The parties agree that remand is required for the Board to provide an adequate statement of reasons or bases for whether Appellant's claim for accrued benefits qualified as a motion to substitute into the Veteran's motion to revise the April 1992 rating decision on the basis of CUE. In January 2009, the Veteran filed a claim for entitlement to an earlier effective date earlier than June 30, 1989, for his service-connected anxiety reaction, major depression. (R. at 388, 391-95). Subsequently, the Veteran clarified this claim as a motion for an earlier effective date on the basis of CUE in a VA rating decision issued in April 1992. (R. at 346-47, 362). In October 2009, the RO issued a rating decision that determined that no revision on the basis of CUE was warranted for the evaluation of the Veteran's service-connected anxiety reaction. (R. at 329-330 (327-32)). The Veteran died on February 27, 2010. (R. at 291).

In May 2010, Appellant, the Veteran's surviving spouse filed VA Form 21-534, claim for Dependency and Indemnity Compensation (DIC) and accrued benefits (R. at 278-85), and the RO, *inter alia*, granted Appellant's claim for DIC in an August 2010 rating decision (R. at 264-67). Appellant timely appealed the denial of accrued benefits (R. at 243-55), and a BVA hearing was held in September 2014 (R. at 2268-83). In February

2015, the Board issued a decision that dismissed Appellant's claim of CUE. (R. at 2-8). The Board also noted that substitution was an alternate theory of recovery, but that Appellant had not requested nor had the RO granted substitution. (R. at 7). The Board also agreed that an inferred claim for Special Monthly compensation for aid and attendance was raised within the Veteran's lifetime and referred the claim to the Agency of Original Jurisdiction. This claim is not at issue in in this case.

38 U.S.C. § 5121A provides that "[i]f a claimant dies while a claim for any benefit under a law administered by the Secretary, or an appeal of a decision with respect to such a claim, is pending, a living person who would be eligible to receive accrued benefits due to the claimant under section 5121(a) of this title may, not later than one year after the date of the death of such claimant, file a request to be substituted as the claimant for the purposes of processing the claim to completion." Regarding motions for substitution, 38 CFR 3.1010(c)(2)) states:

In lieu of a specific request to substitute, a claim for accrued benefits, survivors pension, or dependency and indemnity compensation by an eligible person listed in §3.1000(a)(1) through (5) is deemed to include a request to substitute if a claim for periodic monetary benefits (other than insurance and service-members' indemnity) under laws administered by the Secretary, or an appeal of a decision with respect to such a claim, was pending before the agency of original jurisdiction or the Board of Veterans' Appeals when the claimant died.

Here, the Board erred when it dismissed Appellant's claim for accrued benefits, arising out of the Veteran's motion for an earlier effective

date based on CUE that was pending at the time of his death, after determining that substitution was not at issue. (R. at 7). The record indicates that a claim for substitution for the Veteran's CUE claim was raised by operation of law pursuant to 38 C.F.R. § 3.1010(c)(2). The RO issued a rating decision in October 2009, and Appellant filed her DIC claim within the one-year period required for filing a timely notice of disagreement. See 38 U.S.C. 7105(c) (NOD must be filed within one year of notice of decision). 38 C.F.R. § 3.1010(c)(2) specifically provides that a DIC claim would be deemed as a request to substitute for all *pending* claims. Despite this provision, the Board erred when it did not find that substitution for the Veteran's CUE claim was raised by the record. See (R. at 7).

Because Appellant had filed a claim for DIC and accrued benefits (R. at 278-85) while the Veteran's CUE claim was still pending, the Board should have addressed the application of 38 C.F.R. 3.1010(c)(2). *Schafraht v. Derwinski*, 1 Vet.App. 589, 592-93 (1991) (stating that the Board must consider and discuss all applicable provisions of law and regulation where they are made "potentially applicable through the assertions and issues raised in the record").

Moreover, the parties note that the Board statement that the Veteran's CUE claim does not survive the death of the claimant is not accurate. See *Padgett v. Nicholson*, 473 F.3d 1364, 1366-67 (Fed. Cir.

2014)(the Federal Circuit allowed a surviving spouse to substitute on a Veteran's appeal to the Court, in part, because the Veteran had a claim pending at the time of death); *see also Rusick v. Gibson*, 760 F.3d 1342 (Fed. Cir. 2014) (the Federal Circuit recognizes that “[38 U.S.C. §] 5121A might now allow a survivor to substitute on a pending CUE claim that the veteran had filed before his death . . . ”); *Haines v. West*, 154 F.3d 1298, 1301 (Fed. Cir. 1998) (*Rusick* stated that the *Haines* holding was that “...a survivor cannot initiate a freestanding CUE claim under section 5109A **if the Veteran had not already filed such a claim**”)(emphasis added).

As such, Appellant’s claim must be remanded in order for the Board to provide an adequate statement of reasons or bases for its decision to not adjudicate the CUE claim raised by the Veteran prior to his death and pending at his death in light of both the timely request to substitute filed by Appellant and the Court’s holdings in *Haines* and *Rusick* that a survivor may continue a CUE claim initiated by a Veteran that was pending at his death.

In any subsequent decision, the Board must set forth adequate reasons or bases for its findings and conclusions on all material issues of fact and law presented on the record. *Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990). On remand the BVA must ensure compliance with all relevant provisions of 38 U.S.C. §§ 5103, 5103A and 38 C.F.R. § 3.159. See *Pelegri v. Principi*, 18 Vet.App. 112 (2004); *Nolen v. Gober*, 14 Vet.App.

183 (2000) (per curiam order). Appellant shall be free to submit additional evidence and/or argument in support of her claim, and the Board must consider any such argument or evidence submitted. *Kutscherousky*, 12 Vet. App. at 372. The Board will also “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). The Parties respectfully request the Court expressly incorporate the terms of this motion into the order, so Appellant may have enforceable rights with respect to the terms of this Joint Motion, and that the Court remand this appeal for further action consistent with the foregoing. Finally, the Board must ensure that the claim is given expedited treatment on remand. 38 U.S.C. § 7112. The VA should incorporate this Joint Motion for Remand and the Court’s order with the claims file for consideration in its readjudication of the claims.

CONCLUSION

WHEREFORE, the parties move the Court to enter an order partially vacating and remanding the February 3, 2015, Board decision that dismissed Appellant’s claim of entitlement to an earlier effective date than June 9, 1989 for the assignment of a 100 percent schedular evaluation for the Veteran’s service-connected psychiatric disorder, with anxiety reaction and depression, on the basis of CUE in an April 1992 rating decision, on an accrued benefits basis.

Respectfully submitted,

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Date: February 10, 2016

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