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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 17-1847

ANNIE M. LEE, APPELLANT,

v.

ROBERT L. WILKIE,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before BARTLEY, *Chief Judge*, and PIETSCH and MEREDITH, *Judges*.

ORDER

*Note: Pursuant to U.S. Vet. App. R. 30(a),
this action may not be cited as precedent.*

On March 26, 2019, the above-captioned appeal was submitted to a panel of the Court for decision. On June 28, 2019, appellant's counsel notified the Court that the appellant, Annie M. Lee, had died.

On July 25, 2019, the Court ordered appellant's counsel to, inter alia, either file a motion to substitute an individual as the appellant in the appeal or notify the Court that no such substitute could be found. After being granted two extensions of time to comply with that order, appellant's counsel, on November 7, 2019, filed a motion to substitute Ms. Lee's son, Christopher B. Lee, as the appellant in this appeal. Appellant's counsel argued that Mr. Lee was a qualified substitute because he "was responsible for paying \$2,500 of [Ms. Lee's] burial expenses." Motion to Substitute (Mot. to Sub.) at 4.

On November 21, 2019, the Secretary filed an interim response to the motion to substitute, asserting that he was unable to take a position on the motion because the agency of original jurisdiction (AOJ) had not yet decided whether Mr. Lee was an eligible accrued-benefits claimant. On December 19, 2019, the Court ordered the Secretary to periodically update the Court as to the status of the AOJ's eligibility determination until the matter was resolved.

On December 31, 2019, the Secretary notified the Court that, on December 19, 2019, the AOJ determined that Mr. Lee was not an eligible accrued-benefits claimant and, therefore, denied his motion to substitute before VA, because there was no evidence that Mr. Lee had borne the expense of Ms. Lee's last sickness and burial. Secretary's December 31, 2019, Response (Resp.) at 2. The Secretary appended to his response a copy of the AOJ decision, which stated, in pertinent part:

We also took our telephone conversation with the Funeral Director of Lewis-Robusky Mortuary, LLC[,] on December 19, 2019[,] into consideration when adjusting your benefits.

In that conversation, the funeral director stated you did not pay for any of the funeral expenses. All funeral expenses . . . were paid by Valerie Byrd and Michael Lamb.

Id., Exhibit (Ex.) A at 1. Accordingly, the Secretary argued that the instant appeal should be dismissed because Mr. Lee was "not a party eligible for substitution and no other party has requested substitution." *Id.* at 2. Appellant's counsel has not responded to the Secretary's filing.

When an appellant dies during the pendency of an appeal for disability compensation under chapter 11 of title 38 of the U.S. Code, the appropriate remedy is to vacate the appealed Board of Veterans' Appeals (Board) decision and dismiss the appeal unless there has been an appropriate substitution by an eligible accrued-benefits claimant, including, as relevant here, an individual who bore the expense of the appellant's last sickness and burial. *See* 38 U.S.C. §§ 5121(a)(6), 5121A; *Padgett v. Nicholson*, 473 F.3d 1364, 1366 (Fed. Cir. 2007); *Breedlove v. Shinseki*, 24 Vet.App. 7, 20 (2010) (per curiam order). Whether an individual is an eligible accrued-benefits claimant is "a factual determination that, unless conceded by the Secretary on appeal, must be made by VA in the first instance." *Breedlove*, 24 Vet.App. at 21; *see Zevalkink v. Brown*, 102 F.3d 1236, 1244 (Fed. Cir. 1996) (noting that "the determination of whether a party qualifies as an accrued benefits claimant necessarily involves fact finding"). "[W]hen [an appellant] has died while an appeal is pending here, [and] no one seeks substitution or the person seeking substitution is not an eligible accrued-benefits claimant, then Board vacatur and dismissal of the appeal would be the appropriate action." *Breedlove*, 24 Vet.App. at 21 (citing *United States v. Munsingwear*, 340 U.S. 36, 41 (1950); *Padgett*, 473 F.3d at 1370).

In his November 7, 2019, motion, Mr. Lee asserted that he was eligible to be substituted as the appellant in this appeal because he was going to bear the expense of Ms. Lee's last sickness and burial. Mot. to Sub. at 4. Yet, the AOJ determined that he was not an eligible accrued-benefits claimant because he did not ultimately bear those expenses. *See* Secretary's Resp., Ex. A at 1. Given this factual determination and given that Mr. Lee has not submitted to the Court argument or evidence to refute the AOJ's determination, the Court concludes that the appropriate course of action is to deny Mr. Lee's motion to substitute; vacate the underlying June 7, 2017, Board decision on appeal; and dismiss the appeal. *See Breedlove*, 24 Vet.App. at 21; *see also Munsingwear*, 340 U.S. at 41; *Padgett*, 473 F.3d at 1370.

Upon consideration of the foregoing, it is

ORDERED that Mr. Lee's November 7, 2019, motion to substitute is denied. It is further

ORDERED that the March 29, 2019, motions for oral argument and supplemental briefing, held in abeyance by the Court in its May 15, 2019, order, are denied as moot. It is further

ORDERED that the June 7, 2017, Board decision on appeal is SET ASIDE and the instant appeal is DISMISSED.

DATED: January 29, 2020

PER CURIAM.

Copies to:

Katie K. Molter, Esq.

VA General Counsel (027)