

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

THOMAS SMITH,)	
)	
Appellant,)	
)	
v.)	Vet. App. No. 18-4730
)	
DENIS MCDONOUGH,)	
Secretary of Veterans Affairs,)	
)	
Appellee.)	

**JOINT MOTION FOR CLARIFICATION OF ISSUES
FOR ORAL ARGUMENT**

Mr. Thomas Smith (Appellant) appealed a July 29, 2015, decision of the Board of Veterans' Appeals (Board), as well as the Board's May 9, 2018, Ruling on Motion for Reconsideration, that denied entitlement to reimbursement under the provisions of 38 U.S.C. § 2101, dealing with specially adapted housing (SAH) benefits, for expenses incurred in connection with the construction and operation of a therapeutic spa and outbuilding. Unfortunately, Appellant died in May 2019, and Appellant's counsel filed a motion for substitution in January 2020. In multiple responses to Court orders, the parties have disputed whether this Court should allow Appellant's adult daughter, Karen Hicks, or his estate, to be substituted in this appeal.

The parties have raised various arguments—including, but not limited to, the following—regarding whether substitution is appropriate in this matter. Appellant first contends that substitution is appropriate under 38 U.S.C. §§ 5121A and

5121(a)(6). See Appellant's October 4, 2019, Response to Court Order, at 2-5; Appellant's September 1, 2020, Response to Court Order, at 2-6. Appellant also argues that the right to substitution must be evaluated in light of traditional principles of standing and that the *nunc pro tunc* standard may be invoked to authorize Ms. Hicks to continue the appeal. See Appellant's October 7, 2021, Response to Court Order, at 2-9 (citing 38 U.S.C. § 7266(a); *Suguitan v. McDonald*, 27 Vet.App. 114, 119 (2014)).

The Secretary responded that substitution under 38 U.S.C. § 5121(a)(6) does not apply to SAH benefits, a lump-sum payment, because the statute only applies to "periodic monetary benefits." See Appellee's January 16, 2020, Response to Court Order, at 2-3 (citing *Pappalardo v. Brown*, 6 Vet.App. 63, 65 (1993)); Appellee's June 11, 2020, Response to Court Order, at 3. Further, the Secretary argued Ms. Hicks failed to accurately consider the language of 38 U.S.C. § 5121A and the Federal Circuit's decision in *Merritt v. Wilkie*, 965 F.3d 1357, 1360-62 (Fed. Cir. 2020), and that Ms. Hicks lacks standing under 38 U.S.C. § 7266(a). See Appellee's December 3, 2020, Response to Court Order, at 3-8. The Court submitted the case to a panel for decision on June 27, 2022, and it scheduled oral argument for September 6, 2022. The parties agree that briefing on the merits should be set following this hearing if the Court decides that substitution is allowed.

The parties respectfully seek clarification of the issue, or issues, of interest to the Court to aid the parties in preparing for oral argument. Clarification of the

issues would also assist the Court by ensuring the parties are prepared to address the issue, or issues, the Court believes pertinent to the claims on appeal given the arguments presented in the parties' prior responses to Court orders. Thus, the parties respectfully request the Court clarify the issue, or issues, of interest for oral argument.

WHEREFORE, the parties respectfully move the Court for clarification of the issue, or issues, to be addressed at oral argument.

Respectfully submitted,

FOR APPELLANT:

Date: August 18, 2022

/s/ Jeffrey N. Martin

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