

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

**J. RONI FREUND &
MARY S. MATHEWSON,**

Petitioners,

v.

DENIS McDONOUGH,
in his capacity as
Secretary of Veterans Affairs,
Respondent.

Vet. App. No. 21-4168

MOTION TO SUBSTITUTE PETITIONER

Pursuant to U.S. Vet. App. Rule 43(a)(2), the undersigned counsel respectfully move to substitute in Mark Freund for current Petitioner J. Roni Freund (“Ms. Freund”). The Secretary of Veterans Affairs, through counsel, has informed us that the Secretary currently takes no position on this Motion and reserves the right to file a written response.

Ms. Freund died on July 7, 2022. *See* Resp. to Court Order Dated Aug. 19, 2022 (“9/8/2022 Resp.”), Ex. 1 (filed Sept. 8, 2022) (Ms. Freund’s death certificate). Mark Freund, who is one of Ms. Freund’s surviving brothers, has borne part of Ms. Freund’s final expenses and has applied with the Department of Veterans Affairs (“VA”) to substitute for Ms. Freund for the purposes of processing to completion her claims that were non-final when she died. *See* 9/8/2022 Resp., Ex. 2 (contract, signed by Mark Freund, for interment services costing \$2,800 from St. Francis Xavier Catholic Church); 9/8/2022 Resp., Ex. 3 (payment check, written out and signed by Mark Freund); 9/8/2022 Resp., Ex. 4 (Mark Freund’s September 8, 2022, VA Form 21P-0847, *Request for Substitution of Claimant Upon Death of Claimant*).

We respectfully submit that Mark Freund meets all requirements to substitute in for Ms. Freund. His request to substitute for Ms. Freund in the agency proceedings was timely. *See* 38 U.S.C. § 5121A(a)(1) (2022) (providing one year following a claimant’s death to request substitution); *supra* at 1 (noting how Ms. Freund died on July 7, 2022, and Mark Freund filed his request for VA substitution on September 8, 2022, within one year of Ms. Freund’s death). Bearing part of Ms. Freund’s final expenses renders Mark Freund eligible to serve as substitute claimant. *See* 38 U.S.C. § 5121A(a)(1) (2022) (providing eligibility to substitute to “a living person who would be eligible to receive accrued benefits due to the claimant under section 5121(a) of this title”); *id.* § 5121(a)(6) (providing eligibility to receive accrued benefits to a “person who bore the expense of last sickness and burial”). And, when Ms. Freund died, she had one or more claims before VA that remained pending.

Ms. Freund’s claims that remained pending before VA at the time of her death included the claim that the Petition addresses. That claim is of service-connected compensation for post-traumatic stress disorder. *See* Pet. at 15. Ms. Freund asked this Court for relief from VA’s erroneous closure of and withholding of all further action on Ms. Freund’s timely perfected legacy appeal from a VA denial of service connection for post-traumatic stress disorder. *See* Pet. at 2–3, 15. After this case’s Petition was filed, the Secretary reactivated the appeal. *See* Resp. to Pet. at 2, 3; Reply in Support of Pet. at 4. Even so, the claim’s development remained ongoing when Ms. Freund passed away. *See* Resp. to Pet. at 2 (describing the status as of October 12, 2021). Ms. Freund also had other agency-level proceedings pending.

A substitute claimant steps fully into the original claimant’s shoes for the purposes of prosecuting to conclusion the original claimant’s claims that remained pending when the

original claimant died. *See, e.g.*, 38 U.S.C. § 5121A(a)(1) (2022) (specifying that the substitute claimant’s request is “to be substituted as the claimant for the purposes of processing the claim to completion”); *Reliford v. McDonald*, 27 Vet. App. 297, 302 (2015) (describing the substitution statute, including a statement in its legislative history how VA itself represented to Congress that VA intended for the substitute “to ‘step into the shoes of a claimant who has passed away’ and would entail VA processing the claim as if it were the [original] claimant’s” (quoting *Legislative Hearing on H.R. 1137, H.R. 3047, H.R. 3249, H.R. 3286, H.R. 3415, H.R. 3954, and H.R. 4084 Before the Subcomm. on Disability Assistance and Memorial Affairs of the H. Comm. on Veterans’ Affairs*, 110th Cong. 31 (2007) (statement of Bradley G. Mayes, Director, Compensation and Pension Service, Veterans Benefits Administration)); *see also Substitution in Case of Death of Claimant*, 76 Fed. Reg. 8666, 8666 (Feb. 15, 2011) (proposed rule) (“[A]fter substitution, VA will continue to process the claim or appeal as if the claimant had not died.”).

The substitute claimant’s rights include to maintain an action before this Court in connection with the original claimant’s claims that remained pending when the original claimant died. *See Demery v. Wilkie*, 30 Vet. App. 430, 437–38 (2019) (veteran’s death before an action at this Court begins); *Breedlove v. Shinseki*, 24 Vet. App. 7, 8 (2010) (after). The particular action before this Court may be, as in *Demery*, an appeal—or, as here, a petition that relates to one or more of the original claimant’s claims that remained pending when the original claimant died. Either way, with the substitute claimant stepping fully into the original claimant’s shoes, “no rationale now exists,” with Congress permitting substitution, for limiting the substitute claimant’s ability to proceed before this Court. *See Demery*, 30 Vet. App. at 437 (quoting

Bredlove, 24 Vet. App. at 8). This action's Petition, as noted, relates to one or more of Ms. Freund's claims that remained pending when she died. *See supra* at 2.

For all of these reasons, we respectfully request that the Court substitute in Mark Freund for Ms. Freund as a Petitioner in this case. Concurrently with this Motion, we are submitting for filing the fee agreement pursuant to which we would represent him before the Court in this case.

September 14, 2022

Respectfully submitted,

/s/ John D. Niles

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