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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

JEANINE FRAZIER, Appellant, v. DENIS MCDONOUGH, Secretary of Veterans Affairs, Appellee.	Vet.App. No. 22-4670

MOTION FOR PANEL RECONSIDERATION

INTRODUCTION

Ms. Frazier moves this Court for panel reconsideration of the panel decision decided on May 23, 2024. Ms. Frazier's motion is limited to that portion of the panel's decision which addressed substitution under 38 U.S.C. § 5121A concerning whether there is a limitation in the amount of benefits that can be paid to a substituted claimant under § 5121A who was recognized as an accrued benefits claimant under § 5121(a)(6)

beginning at page 16 of the slip opinion and ending at page 18.

Ms. Frazier submits that this Court's May 23, 2024 decision at pages 16 to 18 constitute an impermissible advisory opinion. Further, Ms. Frazier submits that the current panel decision overlooked the undebatable fact that the Board decision on appeal dismissed Mr. Frazier's claims for specially adapted housing (SAH) or a special home adaptation (SHA) grant and eligibility for automobile and adaptive equipment, or adaptive equipment only without addressing the question of whether Ms. Frazier as a substituted claimant under § 5121A who was eligible to receive accrued benefits under § 5121(a)(6) was limited in the amount of recovery to the amount paid for her father's funeral expenses.

The Case

Clarence Frazier, the veteran died on August 27, 2020 while his claims for specially adapted housing (SAH) or a special home adaptation (SHA) grant and eligibility for automobile and adaptive equipment, or adaptive equipment were pending Board review. RBA 3780-3793. In June 2021, Jeanine Frazier filed both an application for accrued benefits as well as a request to be substituted into the veteran's pending appeal before the Board. RBA 299-304 and RBA 306. VA granted Ms. Frazier's substitution request. RBA 286. In April 2022, the Board after Mr. Frazier's appeal had been dismissed due to his death and reinstated based on her substitution issued the decision on appeal to this Court. RBA 5-25.

ARGUMENT FOR RECONSIDERATION

I.

Pages 16-18 of this Court's May 23, 2014 decision constitutes an impermissible advisory opinion.

This Court in *Norvell v. Peake*, 22 Vet.App. 194 (2008) found that:

> . . . **any pronouncement on whether the Board erred in failing to require VA to obtain those records would constitute a prohibited advisory opinion**. The prohibition against advisory opinions is based on the "case or controversy" doctrine to which this Court adheres. *See Mokal v. Derwinski*, 1 Vet.App. 12, 13 (1990). "Under this doctrine, federal courts are to decide only 'actual controversies by judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in the case before it.' " *Teva Pharm. USA, Inc. v. Novartis Pharm. Corp.*, 482 F.3d 1330, 1337-38 (Fed.Cir.2007) (quoting *Local No. 8-6, Oil, Chem. & Atomic Workers Int'l Union v. Missouri*, 361 U.S. 363, 367, 80 S.Ct. 391, 4 L.Ed.2d 373 (1960)). This Court has repeatedly held that it will not engage in the practice of rendering advisory opinions. *See, e.g., Waterhouse v. Principi*, 3 Vet.App. 473, 474-76 (1992); *see also Haines v. Gober*, 10 Vet.App. 446, 446-47 (1997) (quoting *Landicho v. Brown*, 7 Vet.App. 42, 49 (1994)). As held in *Waterhouse*, to satisfy the case or controversy requirement, a "court must have the ability to resolve the conflict through the specific relief it provides." 3 Vet.App. at 474. Absent the ability to redress an injury through a favorable decision, any act by the Court would be "gratuitous." *Id.* at 475. (citing *Simon v. Eastern Kentucky*, 426 U.S. 26, 38, 96 S.Ct. 1917, 48 L.Ed.2d 450 (1976)).

Norvell, 22 Vet.App. 200. (emphasis added). Based upon the above, this panel must reconsider that portion of its May 23, 2014 decision at pages 16-18 which made a

pronouncement that,

> So, we read section 5121A to require that a person who is allowed to substitute on the grounds that they bore the expense of a veteran's last sickness and burial is limited by the amount of such expense when allowed to substitute into a deceased veteran's claim.

Court's May 23, 2014, slip opinion, p. 18. This pronouncement is an interpretation of the provisions of 38 U.S.C. § 5121A by this Court on a matter which was not addressed by the Board in its decision which constitutes an advisory opinion under this Court's case law.

This pronouncement was part of this Court's discussion of the Secretary's *post hoc* rationalization that even of the Board erred in dismissing Mr. Frazier's two claims for specially adapted housing (SAH) or a special home adaptation (SHA) grant and eligibility for automobile and adaptive equipment, or adaptive equipment. The case law is clear that this Court cannot accept the Secretary's *post-hoc* rationalizations in lieu of reasons or bases from the Board. *See In re Lee*, 277 F.3d 1338, 1345–1346 (Fed. Cir. 2002) ("'[C]ourts may not accept appellate counsel's *post hoc* rationalization for agency action.'") (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)); *Evans v. Shinseki*, 25 Vet.App. 7, 16 (2011) (explaining that "it is the Board that is required to provide a complete statement of reasons or bases, and the Secretary cannot make up for its failure to do so."); *Smith v. Nicholson*, 19 Vet.App. 63, 73 (2005) ("it is not the task of the Secretary to rewrite the Board's decision through his pleadings filed in this Court").

This matter was referred to this panel to address whether under the correct interpretation of 38 U.S.C. § 5121A a qualified accrued benefits recipient can be substituted under for a deceased claimant's pending administrative appeal of a claim that involves a non-accrued benefit. This required an interpretation of § 5121A and its interplay with § 5121(a)(6) because the reason the Board dismissed Mr. Frazier's pending appeals of VA's denial his claims for specially adapted housing (SAH) or a special home adaptation (SHA) grant and eligibility for automobile and adaptive equipment, or adaptive equipment was:

> Even in substitution claims, however, a claimant is eligible for substitution only for claims for periodic monetary benefits, and not for claims for personal benefits administered through the Veterans Health Administration. 38 U.S.C. § 5121A; 38 C.F.R. §§ 3.1000, 3.1010. Automobile and adaptive equipment, SHA, and SAH are considered a non-periodic, personal benefit, and these claims do not survive a veteran's death. 38 U.S.C. § 5121(a); *Gillis v. West*, 11 Vet. App. 441 (1998). These issues, therefore, are not eligible for substitution by the Veteran's adult child, and must be dismissed.

RBA 9. This was an interpretation of § 5121A but the only interpretation made by the Board in the decision on appeal pertained to were **any** substituted appellant under § 5121A could be substituted to complete a pending appeal of VA's denial of Automobile and adaptive equipment, SHA, and SAH because these claims were considered by the Board to be a non-periodic, personal benefit, and these claims do not survive a veteran's death. *Id.*

This Court correctly held that § 5121A unambiguously provides that an eligible accrued benefits recipient can be substituted in a claim for any benefit, including non-accrued benefits. Slip Opinion, p. 2. That should have been under this Court's case law the end of this appeal. Unfortunately, this Court erroneously continued to address a matter not decided by the Board in its decision. It is well established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself."' (quoting *Motor Vehicle Mfrs. Ass'n of the U.S., Inc., v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983))). In this matter, the Board did not address whether an accrued benefits recipient under § 5121(a)(6) was limited to reimbursement for last expenses of sickness and burial and nothing more, even if substituted under § 5121A. The Board's decision was narrow and specific, **no** substituted claimant was permitted to complete an appeal of a VA decision of non-periodic benefits. The Board's decision stopped there and this Court's May 23, 2024 decision should have done so as well.

CONCLUSION

Wherefore, Ms. Frazier respectfully requests that this Court reconsider its May 23, 2014 decision, at pages 16-18, to address the interpretation of 38 U.S.C. § 5121A as its relates to whether there is a limit to recovery of a substituted appellant whose substitution was based on the provisions of 38 U.S.C. § 5121(a)(6).

Respectfully Submitted,

/s/Kenneth M. Carpenter
Kenneth M. Carpenter
Counsel for Appellant
Jeanine Frazier
Electronically filed on June , 2024.