

Not published

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 19-6052

MARGARET MANNINO,

APPELLANT,

v.

ROBERT L. WILKIE,
SECRETARY OF VETERANS AFFAIRS,

APPELLEE.

Before FALVEY, *Judge*.

ORDER

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

On August 28, 2019, the Court filed the appellant's Notice of Appeal (NOA) from a September 12, 2018, Board of Veterans' Appeals (Board) decision, which granted entitlement to special monthly compensation (SMC) based on the need for regular aid and attendance of another person and determined that the grant of SMC at the aid and attendance rate rendered moot the claim for SMC based on housebound status. The NOA consists of a letter from the appellant, Margaret Mannino, stating her desire to appeal the Board decision and identifying the veteran's name as Joseph A. Mannino, whose name appears on the Board decision. Additionally, the NOA indicates that the appellant is the surviving spouse of the veteran and that the veteran passed away on May 2, 2019, after the Board rendered its decision but before the NOA was filed. The appellant states that the September 12, 2018, decision "denied benefits [sic] aid and attendance for post-traumatic stress disorder dating back to the original appeal date of 2014," that "VA finally did approve aid and attendance from 2017," and that "we did disagree with the decided date and had every intention of appealing." NOA at 1.

On January 8, 2020, the Court issued an order: 1) noting that it appeared the appellant was challenging the effective date assigned to the grant of SMC based on the need for aid and attendance but that the September 2018 Board decision did not decide that issue; 2) ordering the appellant to provide a copy of the veteran's death certificate; and 3) ordering the Secretary to file a response including the Secretary's position on the appellant's eligibility as an accrued-benefits claimant and providing information as to the decision that assigned the effective date for the grant of SMC based on aid and attendance.

On January 15, 2020, the appellant filed a response to the Court's order providing a copy of the death certificate that indicates the veteran died on May 2, 2019. On February 24, 2020, the Secretary filed a response to the Court order. In his response, the Secretary informed the Court that: 1) he concedes appellant's eligibility as an accrued benefits claimant and that in a December 13, 2019, rating decision, the VA regional office (RO) granted appellant entitlement to

Dependency and Indemnity Compensation; 2) with respect to the September 12, 2018, Board decision, he contends that this decision may not be appealed because it was favorable to the veteran and that the appeal as to that decision should be dismissed; and 3) he reports that the RO issued a decision on November 26, 2018, assigning an effective date of August 24, 2017, for entitlement to SMC based on the need for aid and attendance.

An eligible accrued-benefits claimant has standing, both as a statutory and as a constitutional matter, to file an appeal on his or her own behalf when a veteran dies during the time permitted to file an NOA. This right arises upon the death of the veteran. Because Congress granted accrued-benefits claimants the right to advance a deceased veteran's appeal on the claimant's own interest, the Court sees no reason to distinguish between the standing necessary to substitute into an existing appeal and the standing necessary to initiate an appeal by filing an NOA. Therefore, an eligible accrued-benefits claimant qualifies as a "person adversely affected" by a final Board decision under section 7266 and has a sufficient injury to support standing under Article III of the Constitution. *See Demery v. Wilkie*, 30 Vet.App. 430 (2019).

As a valid accrued benefits claimant, Margaret Mannino has both statutory and constitutional standing to file an NOA as to the September 12, 2018, Board decision. *Id.* Therefore, she may pursue her appeal at the Court. However, regarding appealing the September 12, 2018, Board decision, as the Secretary pointed out in his response, the decision is favorable to the appellant as it granted entitlement to SMC based on the need for regular aid and attendance of another person. Under the law, this Court may review only final Board decisions which have been decided against a claimant. The appellant will be directed to show cause why the Court should not dismiss this appeal for lack of jurisdiction.

With respect to appellant's request challenging the effective date assigned to the grant of SMC based on the need for aid and attendance, the Secretary responded above that the RO issued a decision on November 26, 2018, assigning an effective date of August 24, 2017, for entitlement to SMC based on the need for aid and attendance. However, under the law, this Court may only review final Board decisions which have been decided against a claimant. The November 26, 2018, RO decision is not a final Board decision and may not be reviewed by this Court.

Upon consideration of the foregoing, it is

ORDERED that, within 20 days after the date of this order, the appellant must explain why the Court should not dismiss this appeal. If the appellant fails to do so, the Court may dismiss this appeal without further notice. Proceedings on this appeal are stayed until further order of the Court.

DATED: March 13, 2020

BY THE COURT:



JOSEPH L. FALVEY, JR.
Judge

Copies to:

Margaret Mannino

VA General Counsel (027)