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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 19-4306

ERIC A. JOHNSON, APPELLANT,

v.

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

Before MEREDITH, *Judge*.

MEMORANDUM DECISION

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

MEREDITH, *Judge*: The appellant, Eric A. Johnson, through counsel appeals a June 4, 2019, Board of Veterans' Appeals (Board) decision that denied initial disability ratings in excess of 10% for left and right knee arthritis, disability ratings in excess of 10% for left and right knee instability, and a disability rating in excess of 30% for pseudofolliculitis barbae. The Board granted separate 10% disability ratings for left and right knee instability from May 5, 2010, to November 18, 2012. These are favorable findings that the Court may not disturb. *See Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007), *aff'd in part and dismissed in part sub nom. Medrano v. Shinseki*, 332 F. App'x 625 (Fed. Cir. 2009); *see also Bond v. Derwinski*, 2 Vet.App. 376, 377 (1992) (per curiam order) ("This Court's jurisdiction is confined to the review of final Board . . . decisions which are adverse to a claimant."). Single-judge disposition is appropriate. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the following reasons, the Court will vacate the Board's decision denying disability ratings in excess of 10% for left and right knee arthritis, in excess of 10% for left and right knee instability, and in excess of 30% for pseudofolliculitis barbae, and dismiss the appeal for lack of jurisdiction.

I. DISCUSSION

On April 7, 2020, the appellant requested a 28-day extension of time to file his brief. As grounds for the motion, his counsel asserted that the parties had agreed to a joint motion for remand, but counsel had been unable to contact the appellant regarding the proposed agreement. Counsel asserted that she believed that the appellant may be deceased, and thus requested additional time to verify whether he died and, if so, whether there is anyone to substitute in the appeal. The Court denied the motion and, on April 8, 2020, ordered the appellant's counsel to inform the Court whether the appellant is deceased and, if he is deceased, to provide a copy of the death certificate and show cause why the June 4, 2019, Board decision should not be vacated and the appeal dismissed.

The appellant's counsel responded on April 29, 2020, that she is unable to show cause why the June 4, 2019, Board decision should not be vacated and this appeal dismissed. In this regard, counsel explains that she made several unsuccessful attempts to contact the appellant, his ex-wife, and adult children; she found news articles indicating that someone with the appellant's same name died in a motorcycle accident on October 29, 2019; and, although she has been unable to obtain a death certificate, with the assistance of the Secretary she obtained the following documents: VA's Notice of Termination of Benefits, indicating that the appellant died on October 29, 2019, and two Social Security Administration inquiries listing the appellant's date of death as October 29, 2019. Response at 1-2, Exhibits A-D. The appellant's counsel further avers that, from his records, it is apparent that the appellant had been divorced from his wife since 2017 and that he had four adult children. *Id.* at 3. Counsel states that she has been unable to identify any other persons with standing to substitute in this appeal. *Id.*

When an appellant dies during the pendency of an appeal for disability compensation under chapter 11 of title 38, U.S. Code, the appropriate remedy is to vacate the appealed Board decision and dismiss the appeal unless there has been an appropriate substitution by a qualified accrued-benefits claimant. *Briley v. Shinseki*, 25 Vet.App. 196, 197 (2012) (per curiam order) (holding that, when an appellant dies during the pendency of an appeal and there is no eligible party for substitution, there is no case or controversy before the Court and the appeal should be dismissed for lack of jurisdiction); *Breedlove v. Shinseki*, 24 Vet.App. 7, 21 (2010) (per curiam order) ("[W]hen a[n appellant] has died while an appeal is pending [at the Court], [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.").

Here, the appellant died before his appeal could be adjudicated. Because no one is seeking substitution in this appeal as a potential accrued-benefits recipient, the Court will vacate the June 4, 2019, Board decision with respect to the matters appealed to the Court and dismiss the appeal for lack of jurisdiction. *See Briley*, 25 Vet.App. at 197; *Breedlove*, 24 Vet.App. at 21.

II. CONCLUSION

Upon consideration of the foregoing, the June 4, 2019, Board decision denying disability ratings in excess of 10% for left and right knee arthritis, in excess of 10% for left and right knee instability, and in excess of 30% for pseudofolliculitis barbae is VACATED and this appeal is DISMISSED for lack of jurisdiction.

DATED: May 8, 2020

Copies to:

Diane Hester, Esq.

VA General Counsel (027)