

Not published

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 19-2658

GARY M. LAMBERT,

APPELLANT,

v.

ROBERT L. WILKIE,

SECRETARY OF VETERANS AFFAIRS,

APPELLEE.

Before GREENBERG, *Judge*.

ORDER

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

On May 15, 2020, the Court issued a memorandum decision that set aside that part of the December 20, 2018, Board of Veterans' Appeals decision that denied service connection for tinnitus and remanded the matter for further development and readjudication. On June 9, 2020, judgment was entered. On August 11, 2020, mandate issued. On the same date, the appellant's counsel filed an application for attorney fees and expenses pursuant to the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412; that application is still pending.

On August 17, 2020, the Secretary notified the Court of the appellant's death and filed a motion to recall the mandate. On September 14, 2020, the appellant's counsel provided the Court with a copy of the death certificate indicating that the appellant died on July 13, 2020. On September 16, 2020, the appellant's counsel filed a motion for substitution, on behalf of Judith Lambert (Ms. Lambert), the veteran's widow. *See Breedlove v. Shinseki*, 24 Vet.App. 7, 13 (2010) (per curiam order). On October 16, 2020, the Secretary informed the Court that on October 7, 2020, the Anchorage regional office made a formal agency determination finding that Ms. Lambert is an eligible claimant for substitution and that the Secretary does not oppose the motion to substitute parties.

The Court is satisfied that it has jurisdiction over this appeal and, pursuant to *Breedlove* will grant Judith Lambert's motion for substitution. Specifically, regarding substitution, the Court in *Breedlove*, held that the enactment of 38 U.S.C. § 5121 A, although not directly applicable to this Court, "nonetheless alter[ed] the underpinnings of this Court's jurisprudence on substitution," and that "a veteran's chapter 11 disability benefits claim survives the death of the veteran, not for the purpose of providing VA benefits to a veteran, but for purposes of furthering the processing of the claim of an eligible accrued-benefits claimant." *Breedlove*, 24 Vet.App. at 8. Further, "an EAJA claim survives the death of the party to the underlying claim." *Phillips v. Shinseki*,

581 F.3d 1358, 1367 (Fed. Cir. 2009) (citing *Cohen v. Brown*, 8 Vet.App. 5, 7 (1995) (per curiam order)). To hold otherwise "would discourage representation of disabled, ailing, or aging veterans," a result contrary congressional intent. *Cohen*, 8 Vet.App. at 7.

Upon consideration of the foregoing, it is

ORDERED that the Court's mandate of August 11, 2020, is recalled. It is further

ORDERED that Judith Lambert's motion for substitution as the appellant is granted nunc pro tunc to July 13, 2020, the date of the veteran's death. It is further

ORDERED that the Clerk of the Court shall change the caption of the case to reflect that Judith Lambert is now the appellant. It is further

ORDERED that the Clerk of the Court shall issue mandate as of the date of this order. It is further

ORDERED that the Clerk of the Court is directed to file the appellant's EAJA application as of the date of this order. It is further

ORDERED that, within 30 days after the date of this order, the Secretary file a response to the EAJA application.

DATED: October 30, 2020

BY THE COURT:

A handwritten signature in blue ink, appearing to read "William S. Greenberg", with a stylized flourish at the end.

WILLIAM S. GREENBERG
Judge

Copies to:

John S. Berry, Esq.

VA General Counsel (027)

mvl