

Not published

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 18-4730

THOMAS SMITH,

APPELLANT,

v.

DENIS McDONOUGH,

SECRETARY OF VETERANS AFFAIRS,

APPELLEE.

Before GREENBERG, ALLEN, and FALVEY, *Judges*.

ORDER

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

On August 30, 2018, Air Force veteran Thomas Smith, through counsel, appealed a July 29, 2015, Board of Veterans' Appeals decision denying entitlement to reimbursement as specially adapted housing (SAH) benefits for expenses incurred in building and operating a therapeutic spa and outbuilding. Mr. Smith unfortunately passed away in May 2019 during the pendency of his appeal.

On January 22, 2020, the appellant's counsel moved to substitute Mr. Smith's adult daughter, Karen Hicks, as appellant. Ms. Hicks seeks to be substituted as an eligible accrued benefits claimant or as the personal representative of Mr. Smith's estate. *See Breedlove v. Shinseki*, 24 Vet.App. 7, 13 (2010) (per curiam order); U.S. VET. APP. R. 43(a)(2). The Secretary opposes this motion.

On June 13, 2022, after a series of filings by each party, the case was submitted to a panel of the Court. Oral argument is scheduled for September 6, 2022.

The parties have filed a joint motion for clarification of the issues for oral argument. The Court agrees that it would be helpful to narrow the issues for discussion.

To that end, the parties should be prepared to discuss the following issues during oral argument:

- Whether the Court has authority to grant nunc pro tunc relief in a claim for non-accrued benefits after the original claimant has died, and whether it would be appropriate to do so here. In addressing this issue, the parties should be prepared to discuss *Padgett v. Nicholson*, 473 F.3d 1364 (Fed. Cir. 2007); *Suguitan v. McDonald*, 27 Vet. App. 114

(2014) (per curiam order), *Pekular v. Mansfield*, 21 Vet.App.495 (2007), and any other related cases.

- Whether substitution of the appellant is appropriate in a claim for non-accrued benefits. If so, whether and how the proposed substitute-appellant's eligibility or ineligibility as an accrued benefits claimant impacts her ability to be substituted.
- Whether the fact that appellant did not file a motion to revise a final June 2008 regional office decision that denied SAH benefits, the non-accrued benefits at issue in this appeal, based on clear and unmistakable error has any effect on the proposed substitute-appellant's eligibility as an accrued benefits recipient. Does it affect standing?
- The extent to which the law allows the personal representative of a deceased appellant's estate to be substituted as appellant under Rule 43(a)(2) of the Court's Rules of Practice and Procedure.

Upon consideration of the foregoing, it is

ORDERED that the parties will be prepared to discuss the above issues at oral argument.

DATED: August 22, 2022

PER CURIAM.

Copies to:

Jeffrey N. Martin, Esq.

VA General Counsel (027)