

**IN THE UNITED STATES COURT OF APPEALS  
FOR VETERANS CLAIMS**

<b>THOMAS SMITH,</b>	)	
	)	
Appellant,	)	
	)	
v.	)	Vet. App. No. 18-4730
	)	
<b>DENIS MCDONOUGH,</b>	)	
Secretary of Veterans Affairs,	)	
	)	
Appellee.	)	

**APPELLEE’S MOTION TO STRIKE SECTION II OF THE PROPOSED  
SUBSTITUTE-APPELLANT’S SEPTEMBER 14, 2022, RESPONSE TO COURT  
ORDER AND EXHIBITS CITED THEREIN**

Pursuant to U.S. Vet. App. Rule 27(a), Appellee, Denis McDonough, Secretary of Veterans Affairs, moves the Court to strike Section II of the proposed substitute-appellant’s September 14, 2022, response to the Court’s order and all exhibits cited therein.

Oral argument was held in this matter on September 6, 2022. During oral argument, the Court ordered the parties to file certain documents with the Court. To this end, the Court issued an order on September 7, 2022, memorializing its bench order; the Court identified the documents to be filed and instructed the parties to submit these documents within seven days from the date of the order. See September 7, 2022, Court Order. In the order, the Court instructed the proposed substitute-appellant to submit two documents: (1) “a copy of any form requesting a determination of Ms. Hicks’s eligibility as an accrued benefits claimant that was submitted to VA after Mr. Smith’s death”; and (2) “a copy of an order from

a court of competent jurisdiction appointing Ms. Hicks as the personal representative of Mr. Smith's estate." *Id.* In Section I of her September 14, 2022, response to the Court's order, the proposed substitute-appellant purported to provide these requested documents.<sup>1</sup> See September 14, 2022, Response at 1-2 and Exhibits 1-2; see *also* September 8, 2022, Secretary Response at 1-2. In Section II, however, the proposed substitute-appellant provided additional argument and evidence regarding various questions posed by this Court at oral argument. See September 14, 2022, Response at 2-10 and Exhibits 3-15. The Court should strike this argument and evidence.

Most of the proposed substitute-appellant's September 14, 2022, filing is non-responsive to, and outside the scope of, the Court's September 7, 2022, order. The Secretary objects to the proposed substitute-appellant's attempt to provide additional argument after the submission of the case to the Court on the question

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<sup>1</sup> Exhibit 1 appears to be copy of an order from a court of competent jurisdiction appointing Ms. Hicks as the personal representative of the Veteran's estate. Assuming this is accurate, the Secretary agrees Exhibit 1 is responsive to the Court's Order. The Secretary, however, does not concede that Exhibit 2 is responsive to the Court's September 7, 2022, Order instructing the proposed substitute-appellant's counsel to file "a copy of any form requesting a determination of Ms. Hick's eligibility as an accrued benefits claimant that was submitted to VA after Mr. Smith's death." The proposed substitute-appellant contends that her January 2020 submission to VA of VA Form 21-22a, which is used to appoint an individual as a claimant's representative, is responsive to the Court's request. See September 14, 2022, Response at 2 and Exhibit 2. The proper form to file to apply for accrued benefits is VA Form 21P-534EZ. The proposed substitute-appellant did not file this form with VA within one year of the Veteran's death or otherwise.

of substitution. Further, and as she mentions, many of the issues she identifies were listed in this Court's August 22, 2022, order in response to the parties' motion for clarification. September 14, 2022, Response at 2. The proposed substitute-appellant had ample opportunity at oral argument to advance her position on these topics. And it is inappropriate for her to attempt to advance additional argument in her response to the Court's September 7, 2022, Order, which ordered only that the parties file specific documents with the Court. Thus, the Secretary moves this Court to strike Section II of the proposed substitute-appellant's response. In the alternative, if the Court does not strike Section II of the response, the Secretary requests an opportunity to respond to the proposed substitute-appellant's arguments in a written submission to the Court.

This Court should also strike the approximately 100 pages of exhibits the proposed substitute-appellant attaches to her response, see September 14, 2022, Response, Exhibits 3-15, which are non-responsive to the Court's order. (The Secretary does not request Exhibits 1 and 2 be stricken, but again does not concede that Exhibit 2 is responsive to the Court's order). The Secretary further specifically objects to Exhibit 11, which are emails between counsel during the pendency of this appeal. Counsel did not consent to disclosure of these emails or their filing with the Court. Exhibits 3-15 are non-responsive to the Court's order and should be stricken.

Undersigned counsel has contacted counsel for the proposed substitute-appellant regarding this motion, and he indicated he is opposed. Additionally, he advised he will file an opposition to this motion by October 5, 2022.

**WHEREFORE**, Appellee, Denis McDonough, Secretary of Veterans Affairs, respectfully moves the Court to issue an order striking Section II of the proposed substitute-appellant's September 14, 2022, response to Court order and Exhibits 3-15.

Respectfully submitted,

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