

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

CARMEN ENCARNACION	)	
	)	
Appellant,	)	
	)	
v.	)	Vet. App. No. 21-1411
	)	
DENIS MCDONOUGH	)	
Secretary of Veterans' Affairs,	)	
	)	
Appellee.	)	

***SOLZE* NOTICE**

This Court has directed that, in all cases before it, the parties are under a duty to notify the Court of developments that could deprive it of jurisdiction or “otherwise affect its decision.” *Solze v. Shinseki*, 26 Vet. App. 299, 301 (2013). This duty is continuing and encompasses “any development which *may conceivably affect*” the Court’s decision in a case. *Id.* at 302 (emphasis in original). When any such development occurs, it is “irrelevant” whether a party believes it would affect the Court’s decision because “that [is] not a question within the parties’ power to decide.” *Id.*

Appellant is hereby informing the Court of a jurisdictional issue that was discovered by the undersigned counsel while reviewing the case in preparation for the upcoming oral argument scheduled for October 27, 2022. Appellant states that the issue uncovered during review deprives this Court of jurisdiction to hear this appeal.

The Veteran passed away on October 25, 2011. (R. 2427). Prior to his death, he had filed a VA Form 9 on March 26, 2011 (R. 2489), appealing all issues stemming from a March 22, 2011 Statement of the Case (“SOC”) (R. 2513-50). Appellant, the Veteran’s

widow, submitted a statement on November 2, 2011 that stated she wished to, “continue his appeal for accrued benefits.” (R. 2427). On March 8, 2012, VA denied the claim for accrued benefits stating, “[w]e can’t approve your claim for accrued benefits because VA didn’t owe the veteran any money.” (R. 2347-50). Appellant submitted another statement on March 17, 2012, informing VA that she “want[ed] to continue his claim[s.]” (R. 2335).

On January 5, 2016, VA issued a decision that notes that Appellant requested “substitution of appeal” following the Veteran’s death. (R. 1974-79). The 2016 decision granted a 10 percent rating for left lower extremity radiculopathy limited to accrued benefits and noted that the “rating was prepared...based on evidence in file at the time of death.” (R. 1977). VA also certified the rest of the claims that were pending at the Veteran’s death to the Board. (R. 1980).

On May 24, 2016, the Board issued a decision, noting that Appellant’s November 2011 and March 2012 VA Forms 21-4138 “could be construed as a request to be substituted as the appellant in this case.” (R. 1844). However, the Board noted that the “issue of whether [Appellant] may be substituted as the appellant...has not been specifically adjudicated by the AOJ.” *Id.* The Board dismissed the claims for lack of jurisdiction, citing 38 C.F.R. § 20.1302 and 38 U.S.C. § 7104(a). The Board further instructed VA to issue a decision as to whether Appellant may be substituted for the Veteran. *Id.* On remand, VA did not issue a decision as to whether Appellant may be substituted for the Veteran.

On September 28, 2017, the Board issued another decision, stating, “the Board issued a decision in May 2016 that dismissed these claims, but noted on that occasion that the appellant could continue these claims if she filed a valid claim for substitution.” (R.

286.) The Board also stated that the 2016 Board had also remanded a “nonspecific claim for ‘accrued benefits’ on the basis that the appellant submitted a notice of disagreement on this issue, and she was entitled to a statement of the case.” *Id.* The Board then cited to 38 C.F.R. § 3.1010 (substitution) and stated, “[t]he claims remain on appeal for purposes of accrued benefits. However, given the confusion, and given the apparent absence of any notice sent to the appellant as to how she may pursue these claims, these claims should be remanded for notice and the opportunity to present evidence....” (R. 287).

On December 4, 2017, VA sent Appellant a notice letter, outlining the evidence she could submit to substantiate the Veteran’s pending claims. (R. 264-73). However, again, VA did not issue any determination as to whether Appellant may be substituted for the veteran before returning the appeals to the Board.

Finally, in a May 16, 2018 decision, the Board acknowledged that it “sought a determination by the Agency of Original Jurisdiction (AOJ) as to whether the Appellant is a valid substitute claimant for the Veteran’s pending appeals at the time of his death.” (R. 182). The 2018 Board acknowledged that VA did not make a formal determination but concluded that “[based on] the AOJ’s actions it is clear they approved her request to substitute and afforded her the appropriate notice rights.” *Id.* The 2018 Board then stated, “[t]hus, the Board will proceed to address the claims on a substitution basis.” *Id.*

Accrued benefits claims are not the same as claims for substitution. Accrued benefit claims are claims for benefits “to which a payee was entitled at his or her death under existing ratings or decisions or those based on evidence in the file at date of death, and due and unpaid will, upon the death of such person....” 38 C.F.R. § 3.1000(a); *see also* 38

U.S.C. § 5121. This is evident in VA's March 8, 2012 denial of Appellant's claim for accrued benefits because the denial stated, "[w]e can't approve your claim for accrued benefits because VA didn't owe the veteran any money." (R. 2347-50). Accrued benefits claims are intended to recover moneys already awarded by VA at the time of death that had not been paid to the veteran at the time of death.

However, substitution is governed by a different statute and regulation. Substitution allows certain survivors to "request to substitute for the deceased claimant in a claim for periodic monetary benefits...under laws administered by the Secretary, or an appeal of a decision with respect to such a claim, that was pending...when the claimant died." 38 C.F.R. § 3.1010(a); *see also* 38 U.S.C. § 5121A. Under § 3.1010(c)(2), a claim for accrued benefits or for DIC benefits "is deemed to include a request to substitute...." Any request to substitute must be decided by the AOJ "in the first instance" and the AOJ must "provide written notification of the granting or denial of a request to substitute to the person who filed the request...." 38 C.F.R. § 3.1010(e)(1). VA discussed this provision when implementing the regulation, stating, "allowing the Board to decide a substitution request would deprive the survivor of the right to the 'one review on appeal' mandated by 38 U.S.C. 7104(a). 76 FR at 8667-8668, Feb. 15, 2011." Substitution in Case of Death of Claimant (Final Rule), 79 Fed. Reg. 52977, 52979 (September 5, 2014). The Secretary stated, "absent authority from Congress, a request to substitute in a decedent's claim or appeal must be decided in the first instance by the VA agency of original jurisdiction." *Id.* The Board's lack of jurisdiction is further noted in 38 C.F.R. § 20.1302(a). This regulation

states that, if a veteran dies while they have an appeal pending before the Board, the Board will dismiss the claims.” 38 C.F.R. § 20.1302(a).

The Board derives its jurisdiction from 38 U.S.C. § 7104(a), which states, “[a]ll questions in a matter which under section 511(a) of this title is subject to a decision by the Secretary shall be subject to one review on appeal to the Secretary.” In the promulgation of the final rule (§ 3.1010), the Secretary explicitly noted that the Board did not have jurisdiction over initial claims for substitution. Substitution in Case of Death of Claimant (Final Rule), 79 Fed. Reg. 52977, 52979 (September 5, 2014) (Noting that VA revised “[p]roposed § 3.1010(g)(5) [because it] could have been interpreted as saying that the Board has jurisdiction over initial claims [for substitution].”). Thus, if the AOJ never issues a “written notification of the granting or denial of a request to substitute to the person who filed the request...,” then the Board never had jurisdiction to adjudicate the appeals. 38 C.F.R. §§ 3.105(e)(1); 20.1302(a); 38 U.S.C. § 7104(a). Further, the May 24, 2016 Board decision acknowledged the lack of jurisdiction and dismissed the claims for VA to make a determination under § 3.1010(e), as was required by § 20.1302(a). (R. 1844).

As noted in the relevant facts discussed above, VA failed to properly adjudicate Appellant’s 2011 claim as a claim for substitution, pursuant to § 3.1010(c)(2). Given that the Veteran was not owed any money by VA based on a recent VA decision at the time of his death, Appellant’s request to continue her husband’s claims *could not properly be characterized as accrued benefits claims*. See 38 C.F.R. § 3.1000(a).

The 2017 Board decision attempted to make a factual finding that all the requirements for substitution were met in this case. (R. 287). However, that factual finding

is not sufficient to confer jurisdiction upon the Board. 38 C.F.R. §§ 3.1010(e) and § 20.1302(a). Similarly, the 2018 Board made a factual finding that “AOJ’s actions [make it] clear they approved her request to substitute and afforded her the appropriate notice rights.” (R. 182). However, inferring the AOJ’s decision based on actions is similarly insufficient when the regulations at issue *specifically require a written decision* from the AOJ. 38 C.F.R. §§ 3.1010(e)(1) (the AOJ must “provide written notification of the granting or denial of a request to substitute”) and § 20.1302(a). Moreover, the idea that the “actions” of the AOJ could suffice as a “decision” is absurd because a claimant cannot appeal “actions” by the AOJ. Thus, it is indisputable that the Secretary’s regulation contemplated a formal decision under § 3.1010(e) to confer jurisdiction on the Board.

For the reasons discussed above, *the Board never had jurisdiction* under § 7104(a) to decide Appellant’s claims. Given these facts, there cannot be a final Board decision for this Court to review. “This Court’s jurisdiction is limited to reviewing final Board decisions.” *Howard v. Gober*, 220 F.3d 1341, 1344 (Fed. Cir. 2000); 38 U.S.C. § 7252(a). In summary, if the Board never had jurisdiction to adjudicate these claims, then the Court cannot have jurisdiction to adjudicate the claims on appeal. Thus, Appellant states that the newly discovered issue deprives the Court of jurisdiction.

Therefore, Appellant is notifying the Court that she intends to raise the issue of jurisdiction in the first instance. Appellant states that the Court should exercise its jurisdiction to the extent that the Court remands the claims for the Board to ensure that VA adjudicates the substitution issue in the first instance, prior to adjudicating the original claims.

Dated: October 3, 2022

Respectfully Submitted,

CARMEN ENCARNACION

/s/ Julia N. Giesecking  
Julia N. Giesecking, Esq.  
Veterans' Rights Law Group, PLLC  
373 Neff Road  
Grosse Pointe, MI 48230  
(313) 995-9125  
julia@vetrightslaw.com  
Counsel for Appellant