

*Not published*

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

No. 21-1411

CARMEN L. ENCARNACION,

APPELLANT,

v.

DENIS McDONOUGH,  
SECRETARY OF VETERANS AFFAIRS,

APPELLEE.

Before TOTH, FALVEY, and JAQUITH, *Judges*.

**ORDER**

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

On October 3, 2022, the appellant filed a *Solze* notice with the Court, informing the Court that "a jurisdictional issue [] was discovered by the undersigned counsel while reviewing the case in preparation for the upcoming oral argument scheduled for October 27, 2022" and that the issue "deprives this Court of jurisdiction to hear this appeal." Notice at 1. The issue, she argues, is that VA never adjudicated whether Carmen L. Encarnacion is the proper substitute to continue this claim after the veteran passed away in 2011. However, the appellant's counsel also states that VA, in a May 2018 decision, noted that Mrs. Encarnacion is the proper substitute for the veteran's claims. R. at 182. The record also shows that the issue of substitution was addressed in a June 2018 regional office letter, and that letter ruled in Mrs. Encarnacion's favor on the substitution issue. R. at 113 ("We approved your claim for accrued benefits because you provided evidence that you are the surviving spouse of the Veteran.").

The Court has the authority to determine whether it has jurisdiction to hear a particular case. *United States v. Ruiz*, 536 U.S. 622, 628 (2002) (citing *United States v. United Mine Workers of America*, 330 U.S. 258, 291 (1947)).

At oral argument, appellant's counsel is free to raise any matters related to substitution as well as any issues affecting the jurisdiction of this Court or the Board. Relatedly, the parties should be prepared to discuss generally the propriety and significance of the Board's findings with regard to substitution in light of governing law. *See* 38 U.S.C. § 5121A, 38 C.F.R. § 3.1010 (2022).

Additionally, the parties should be prepared to discuss whether the rulings cited above mark a concession by the Secretary of the nature identified in *Breedlove v. Shinseki*, 24 Vet.App. 7, 21 (2010) (The determination of whether a party is an eligible accrued-benefits claimant is "a factual determination that, unless conceded by the Secretary on appeal, must be made by VA in the first instance.").

DATED: October 6, 2022

PER CURIAM.

Copies to:

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VA General Counsel (027)