

In The
UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

MOTION GRANTED

January 6, 2023



Joseph L. Toth
Judge

Virginia T. Mayfield,)	
Appellant,)	No. 21-8176
)	
v.)	Motion for Initial Review
)	By Panel
Denis McDonough,)	
Secretary of Veterans Affairs,)	
<u>Appellee.</u>)	

Jacquelyn W. Covington, applicant for substitution, hereby moves the Court to order an Initial Panel Review pursuant to the Court's Rule 27.1. Panel review is appropriate, if not compelled, by the Secretary's position that Ms. Covington must file a form requesting "accrued benefits" in order to obtain a decision regarding her "substitution" in her grandmother's case to pursue reimbursement for associated funeral expenses. As discussed in the previous *Solze* Notices and the contemporaneously filed motion for leave to file a reply to the Secretary's latest response to the Court's orders, not only is there is no authority for such demands, Congress *exempted* claimants seeking substitution under 38 U.S.C. Section 5121 from having to file *any* form to qualify for benefits under 38 U.S.C. Section 5121 and, thus, substitution under 5121A. 38 U.S.C. § 5101.

As the Secretary wants the Court to accept the remarkable proposition that he can determine which, and how many, forms are required to obtain a

decision of substituting for a deceased claimant, regardless of whether (1) the form submitted by a claimant expressly states that it is “A REQUEST FOR SUBSTITUTION OF CLAIMANT UPON DEATH OF CLAIMANT” and (2) the additionally demanded form(s) are unrelated to substitution, a panel decision is appropriate to opine on the legality that position. The Secretary’s position reflects a novel reading of the applicable statute and a decision on it would establish a new rule of law as the Secretary now equates every request for *substitution* as a claim for an *entitlement*. *Contra Merritt v. Wilkie*, 965 F.3d 1357, 1360 (2020) (“Substitution is not the same as entitlement.”). Further, *Merritt* involved a substitution request from a purported surviving spouse, a situation which requires significant and different factual determinations than a claim based on a receipt(s) for a last expense. *See generally, id.* Application of *Merritt* to a last expense case where there is only a single applicant does not require, e.g., collecting personal information to establish the statutory priority order of payment.

A precedential decision is also appropriate to determine the scope of the Secretary’s authority to demand individuals seeking only to substitute for deceased veterans must also file for accrued benefits – whether or not such benefits yet exist – in order to be substituted. Inappropriately or

unnecessarily collecting personal information of a deceased claimant's relatives when it is not needed to resolve the actual claim submitted is both burdensome on claimants and risks inadvertent disclosure of that information without benefit to anyone. This is fairly an issue of continuing public interest, especially as the Secretary again begins to drown in his own ever-deepening sea of forms, and his history of information security problems.

Indeed, all veterans and their families would benefit from clarification of the language in 38 U.S.C. Section 5101 regarding the payment of benefits to a claimant under 38 U.S.C. Section 5121¹ who "has not filed a formal claim" and whether the Secretary's demand for *any* form under the circumstances of this case is contrary to expressed Congressional intent. The Secretary has yet to explain with other than "because I said so" as to why *two* forms are now required is a situation Congress intended that *no* forms be required.

As a separate issue, even if the Secretary could require Mrs. Covington submit an application form for accrued benefits, the Secretary has provided no basis for his (assumed) authority to adjudicate the existence of accrued benefits when that very issue is being reviewed on appeal in this Court. In

¹ Substitution is based on qualification for benefits under Section 5121 criteria. 38 U.S.C. § 5121A(a)(1).

other words, Mrs. Covington challenges the Secretary's requirement that she must apply for accrued benefits where the Secretary has already denied service-connection on the underlying claims and this Court had asserted jurisdiction over that issue. Indeed, such an application is futile because whatever the Secretary decides regarding service-connection of the underlying claim it is the Court's decision that is determinative.

Especially now that Secretary has already delayed the Court's consideration of the merits of this appeal and already been provided several opportunities to explain his position and (in)actions, the identified issues are significant and ripe for precedential adjudication on a well-developed record. A panel review will also provide an opportunity to address the limits of the Secretary's "form" fixation.

The Secretary promises that he will make any necessary factual findings [], but only after Petitioner files the requested, standardized form as required by 38 C.F.R. § 3.155. The Secretary reports that he *will under no circumstances proceed* until the petitioner submits [a] 'standard application form.' The *trouble is*, 'the *Secretary has no form* to initiate [the requested action].

...

That seems to mean that the *Secretary's regulations block* petitioner from obtaining [the action sought]

Cruse v. McDonough, CAVC No. 21-0288, Order (Feb, 25, 2021) (emphasis supplied).

Finally, this case apparently presents on first impression an opportunity for the Court to address the meaning of the 38 U.S.C. Section 5101 exemption from filing a form in in a factual situation (only seeking reimbursement for final expenses) not addressed in *Merritt*.

Secretary's counsel has informed the undersigned that the Secretary opposes this motion and reserves the right to respond in writing.

Mrs. Covington, therefore, respectfully moves for initial review of the important issues raised in this matter by a panel.

Respectfully submitted,

/s/ Douglas J. Rosinski
701 Gervais St., Ste. 150-405
Columbia, SC 29201-3066
803.256.9555 (tel)
888.492.3636 (fax)
djr@djrosinski.com
Counsel for Appellant