UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

Virginia T. Mayfield, Appellant,	)	
v.	)	No. 21-8176
Denis McDonough, Secretary of Veterans Affairs, Appellee.	)	

SUPPLEMENTAL MEMORANUM OF LAW

Jacquelyn W. Covington hereby provides her Supplemental Memorandum of Law pursuant to the Court's January 20, 2023, Order. Ms. Covington submits that: (1) the Court, not the Secretary or any other party, has plenary authority to decide an individual's substitution motion *in this Court* under *its* Rule 43 because that decision affects the Court's jurisdiction over that individual and their right of access to the Court; and (2) *Merritt v. Wilkie* supports substitution as Mrs. Mayfield filed a timely accrued benefits claim during her lifetime. The only relevant question before the Court, therefore, is whether Ms. Covington is an "appropriate person" to substitute for Mrs. Mayfield *as determined by this Court*. *See* U. S. COURT OF APPEALS FOR VETERANS CLAIMS RULE OF PRACTICE AND PROCEDURE 43 ("Rule 43").

On the merits, there is no reasonable question about whether Ms. Covington is an "appropriate person" under Rule 43. She has provided a

receipt from a funeral home clearly identifying her as the individual paying Mrs. Mayfield's funeral expenses. *See* Jun. 6, 2022, *Motion to Substitute*, Ex. B (funeral home receipt). This fully satisfies the statutory requirement for payment of "so much of the accrued benefits . . . as necessary to reimburse the person who bore the expense of . . . burial" upon the death of a substitute for the veteran payee. 38 U.S.C. § 5121(a)(6). Having paid for Mrs. Mayfield's burial, Ms. Covington also satisfies Section 5121A as a "person seeking to be substituted for" a claimant who has "present[ed] evidence" and is "a living person eligible to receive accrued benefits . . .under [38 U.S.C. § 5121(a)]." 38 U.S.C. § 5121A.

Further, the Secretary has not identified any reason why Ms. Covington is not a proper substitute *under Rule 43*. Moreover, the kerfuffle over the "correct" form to use to seek substitution *under 38 C.F.R. Section 3.1010* is manufactured hokum, as that regulation does not require any particular form. Unrecognized by the Secretary, Ms. Covington has already provided all of the information actually required by that regulation *and* the Secretary's own procedures. *See* Manual M21-1, XI.ii.3.C.1.b (stating "A standard application is *not* required to request to substitute. A request to substitute . . . is deemed to be included when VA receives . . . a written request to substitute containing the" same information already submitted by Ms. Covington). Thus, not only is this "position" of the Secretary on Rule 43,

based as it is on which form was submitted below, irrelevant, it is also in apparent contradiction of his own substitution procedure.[1] Nor apparently has the Secretary revisited his "position" after Ms. Covington identified the conflict to the Court. *See, e.g.*, Nov. 6, 2022, Court Order at 2 ("The Secretary may not rely on Agency procedure as an excuse for failing to comply."). Such an inconsistent and apparently uninformed "position" of the Secretary has served only to stubbornly and unnecessarily delay resolution of a claim that has already outlived both of Ms. Covington's grandparents by larding this action with an arbitrary "bring me another rock" substitution process.

[1] To the extent relevant at all, the purported limitation that VA Form 21P-0847 is reserved solely for surviving spouses appears only in the M21-1 manual. *See* M21-1, XI.ii.3.C.1.a ("claim for accrued benefits may be filed on . . . VA Form 21P-0847" but "only if submitted by a surviving spouse"). There is no explanation for this limitation, nor is it consistent with historical guidance. *See* Fast Letter 10-30 (Aug. 10, 2010) at 2 ("We *will process* substitution requests that are *not accompanied by or in the form of* an accrued benefits claim." (emphasis supplied)); *see also id.,* Encl. A. ¶ 10 ("Accrued benefits claims and requests for substitution *shall be treated as one and the same*." (emphasis supplied)).

Responses to the Court's Questions

Ms. Covington respectfully submits her responses to the Court's specific questions below.

(1) *Under Breedlove v. Shinseki, 24 Vet. App. 7 (2010) (per curiam order), and Rule 43 of the Court's Rules of Practice and Procedure, what is the scope of the Court's authority to rule on a motion for substitution after the Secretary opposes substitution—such as where the regional office denies a parallel request for substitution before the Agency—and the would-be substitute seeks to contest here the propriety of the regional office's denial?*

Neither *Breedlove* or Rule 43 place any limits on the scope of this Court's authority to rule on a motion for substitution in this Court without regard to the Secretary's opposition or action or inaction below. "If substitution is sought in this Court, it remains within the *Court's* discretion to permit substitution." 24 Vet. App. at 20 (emphasis supplied). The *Breedlove* Court further identified the scope of this discretion:

> This Court *may* [1] remand the question of whether a person qualifies as an accrued benefits claimant, [2] stay the appeal until a determination by VA is made, *or* [3] *direct* the Secretary to inform the Court of his determination *within a set period of time*. If the accrued-benefits status of a person seeking substitution *legitimately* is in *dispute*, the Court may take any of the actions noted above, or deny substitution, vacating the Board decision and dismissing the appeal.

24 Vet. App. at 21 (emphasis supplied). This Court chose the third option and directed the Secretary to "not later than 45 days after the date of the order, file a response," among other things "advising the Court as to the Secretary's position on whether there is any reason to believe that the

movant fails to qualify as a person who would be eligible to receive accrued benefits under section 5121(a)." July 5, 2022, Order.

When the Secretary failed to respond and erroneously overlooked the evidence (funeral home receipt) submitted by Ms. Covington, the request for substitution had already "been pending at the AOJ for over three months," when the Court again ordered the Secretary to provide "a response advising the Court as to the status of the AOJ's determination of [Ms.] Covington's request for substitution." Sept. 30, 2022, Order. After still no position was provided, the Court "unfortunately" had to again order the Secretary to submit his position on substitution within 30 days "as it is time for the Agency to decide the issue." Oct. 19, 2022, Order. It was not until December 12, 2022, that the Secretary finally stated that he opposed substitution. *Appellee's Response to the Court's December 6, 2022, Order* (Dec. 12, 2022). And even then, the Secretary refused to address the merits, relying on the lack of filing a "correct form" as the basis for denial. *Id*. at 1-2.

If considered by the Court in its Rule 43 analysis, the Court has authority and a duty to review the Secretary's opposition to substitution because it impacts an individual's standing in, and therefore access to, this Court. *Breedlove* established that an "eligible accrued-benefits claimant . . . has *standing* to pursue substitution." 24 Vet. App. at 20 (emphasis supplied). Yet, the Court cannot simply presume standing but "must affirmatively

satisfy itself that it has authority to act." *Hayre v. Principi*, 15 Vet. App. 48, 50 (2001); *see also Clemons v. Shinseki*, 23 Vet. App. 1, 3 (2009) (per curiam order) (holding that the Court has an independent duty to determine its jurisdiction). As the Secretary's decision regarding substitution (such as it is) affects whether Ms. Covington has standing in this appeal, the Court has not only the authority, but the duty, to affirmatively determine her standing, including whether the Secretary's substitution decision was correct on the law and the facts.

Thus, the scope of the Court's authority to rule on a motion for substitution after the Secretary opposes substitution properly includes a de novo review of the Secretary's denial of substitution – a review, including the relevant factual determinations, which is routinely performed to establish the Court's jurisdiction. Otherwise, the Court would be accepting a conclusion on jurisdiction simply because of a *party's* determination and not the *Court's* determination. *Contra Hayre*, 15 Vet. App. at 50.

In addition, to the extent that *Breedlove* suggested that the Court "must" first obtain a determination from the Secretary on substitution *before the Department*, before the Court can issue a decision on substitution *in this Court*, 24 Vet App. at 20-21, that holding overlooked: (1) the effect of the Secretary's determination on standing; (2) the resulting conflict with, *e.g.*, *Hayre*; and (3) and the internal contradictions of the opinion. *Compare* 24

Vet. App. at 20 ("remains within the Court's *discretion* to permit substitution," *with* 21 ("Court *must* first obtain from the Secretary a determination as to . . . substitution") (emphasis supplied). This part of the *Breedlove* decision is properly clarified, if not overturned.

The Court is also the sole decisionmaker for Rule 43 substitution questions. Under Rule 43, the only relevant question is whether Ms. Covington is an "appropriate person" to substitute for Mrs. Mayfield. Rule 43(a)(2). As this is a *Court* rule, only the Court properly determines who is an "appropriate person" for substitution in a case before it. Further, the Court has established that an "appropriate person" for substitution is an individual "who [is] eligible to make a claim for accrued benefits are determined in accordance with [38 U.S.C. § 5121]." *Breedlove*, 24 Vet. App. at 21. And, as discussed above, in this case the Court has been provided *unchallenged* evidence sufficient to conclude that Ms. Covington is an "appropriate individual" under Rule 43. Whether or not the Secretary agrees or disagrees with the *Court's* decision on satisfaction of the *Court's* Rule 43 has no relevance to or bearing on the Court's conclusion.

(2) *To what extent is the Federal Circuit's opinion in Merritt v. Wilkie, 965 F.3d 1357 (Fed. Cir. 2020), relevant to the preceding question?*

Merritt supports immediate substitution in this case. Unlike Mrs. Merritt, 965 F.3d at 1361, Mrs. Mayfield *did* file an application for accrued benefits

within one year of the veteran's death. *See* R198-205 (VA Form 21P-435EZ dated Oct. 2, 2020); *see also* R193-94 (VA Form 21-4138 dated Oct. 2, 2020, listing nine documents submitted in support of survivor's claims) and R211 (VA Form 21P-0847 dated Oct. 2, 2020, requesting substitution); R37-40 ("We denied your claim for accrued benefits"); *see also* R41-44 (August 16, 2021, rating decision). Indeed, denial of Mrs. Mayfield's accrued benefits claim was appealed to the Board on October 12, 2021, *see* R23-24 (Oct. 12, 2021, submittal of VA Form 10182), and is the basis of the appeal now before this Court. R5-13. Thus, Mrs. Mayfield *did* "preserve her claim for accrued benefits by filing a formal claim within one year of [the veteran's] death as required under 38 U.S.C. 5121(c)." *Merritt*, 965 F.3d at 1363. Thus, this case is not moot, as Ms. Covington will step into the shoes of Mrs. Mayfield and, therefore, will substitute into a remanded case with a preserved claim for the denied accrued benefits. 38 C.F.R. § 3.1010 (a) ("Any benefits ultimately awarded are payable to the substitute").

Finally, and also unlike Mrs. Merritt, Ms. Covington raised the issue of compliance with 38 U.S.C. Section 5101(a)(1)(B)(i) in her submittals, *see, e.g.,*

Motion for Initial Review By Panel (Dec. 12, 2022);[2] *contra Merritt*, 965 F.3d at 1362, thus presenting that issue for this Court's review.

(3) *When a motion for substitution is pending in this Court, and the Secretary wholly conditions his position regarding the motion on the regional office's adjudication of a parallel request for substitution before the Agency, does the Court have any authority to prescribe the timing or manner of the regional office's adjudication?*

Appellant first responds by submitting that this question wrongly assumes that the "Secretary's position" is required before this Court can act on a motion to substitute under its Rule 43. As discussed elsewhere herein, the Court's authority and duty to establish its jurisdiction and to adjudicate the matters before it cannot rest on the "position" of any party. The Court's current practice, therefore, is more properly treated as requesting the Secretary's view on substitution merely to *aid* the Court in *its* substitution decision.

The Court also clearly has authority to direct the Secretary to respond to an *order* within a specific time period (as it has already done more than once in this case) and the power to proceed without a "position" from the Secretary, especially when an appellant's right to judicial review is delayed by the lack of a timely response. Congress invested this Court with the

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[2] Ms. Covington also raised the issue of Section 5101(a)(1)(B) compliance in her proffered *Reply to the Secretary's Response to the Court's Order* for which leave to file was denied.

power to punish by fine of imprisonment contempt of its authority including "disobedience or *resistance to"* a lawful writ, process, *order*, rule, decree, or command." 38 U.S.C. § 7265 (emphasis supplied). Indeed, "[t]hese powers are governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Jones v. Derwinski*, 1 Vet. App. 596, 606-07 (1991) (internal citations and quotations omitted).

It must follow that the Court has the lesser authority to establish a date certain for compliance with an order, whether or not it disturbs the timing of the regional office's adjudication. Indeed, this is often the *purpose* of orders of this Court. Moreover, the lack of such authority would leave the Court impotent in situations, as in this case, where the Secretary ignores or "slow walks" a response or action. *See, e.g., Ribaudo v. Nicholson*, 21 Vet. App. 137, 144 (2007) (requiring the Secretary's compliance with a decision of the Court while on appeal because "it is possible that an interpretation of law by this Court may be the subject of litigation for years"). Should the Secretary perceive a Court order to be overly burdensome or otherwise unmanageable, the proper course is to seek relief, not dodge compliance.

Under specific circumstances, such as the Secretary's evasion in this case, the Court can also order the manner of compliance or at least preclude certain manners of inadequate compliance. This Court has authority, as

relevant here, to "compel action of the Secretary unlawfully withheld or unreasonably delayed," "hold unlawful and set aside . . . conclusions, rules, and regulations . . . found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;" "in excess of statutory jurisdiction, authority, or limitations, or in violation of statutory right;" or "without observance of procedure required by law;" and "hold unlawful and set aside or reverse . . . a finding of material . . . if the finding is clearly erroneous." 38 U.S.C. § 7261(a). In the substitution context, therefore, the Court properly considers: (1) whether the Secretary has abused his discretion in authorizing a substitution "process" which has "unlawfully withheld or unreasonably delayed" a substitution decision; (2) whether the demand for a claim form clearly designated for accrued benefits before adjudicating a substitution request is "arbitrary, capricious, or an abuse of discretion;" and (3) whether the withholding of a substitution decision for a lack of a "formal claim" is in violation of the statutory right(s) of 38 U.S.C. Section 5101(a)(1)(B)(i).

Indeed, Ms. Covington has established that the purported failure to file the "correct" form in this case is inconsistent with the Secretary's regulations and procedures, which do not require any form, only specific information which has already been provided. *See* 38 C.F.R. § 3.1010(c)(1); *see also* Manual M21-1, XI.ii.3.C.1.b. Thus, the Court properly considers whether the

Secretary has complied with his own regulations or acted "without observance of procedure required by law."

In sum, no law requires the Court to consider, much less delay a pending appeal for, the Secretary's position on substitution under 38 C.F.R. Section 3.1010 before rendering a decision on substitution under Court Rule 43. To the extent the Court does rely upon the Secretary's position, the Court has an unequivocal duty to independently review the underlying decision because substitution affects the Court's jurisdiction and, thus, that individual's right of access to this Court.

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