IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

VIRGINIA T. MAYFIELD, Appellant,	)	
v.	)	Vet. App. No. 21-8176
DENIS MCDONOUGH, Secretary of Veterans Affairs, Appellee.	)	

SECRETARY'S SUPPLEMENTAL MEMORANDUM OF LAW

Pursuant to the Court's January 20, 2023, Order, Appellee, Denis McDonough, Secretary of Veterans Affairs, respectfully submits this supplemental memorandum of law.

QUESTIONS PRESENTED

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?

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?

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?

RESPONSE

As an initial matter, *Merritt v. Wilkie*, 965 F.3d 1357 (Fed. Cir. 2020), and *Smith v. McDonough*, 35 Vet.App. 454 (2022) (order), prescribe the proper outcome here—denying the motion for substitution, vacating the underlying Board decision, and dismissing the appeal before the Court—because the proposed substitute-appellant did not submit a claim for accrued benefits within one year of the appellant's death under 38 U.S.C. § 5121(c).

But first, a point of clarification. Substitution before this Court is predicated on whether a proposed substitute-appellant is an eligible accrued beneficiary, which the Court has found is a factual determination that must be made by the Secretary in the first instance. *Breedlove v. Shinseki*, 24 Vet.App. 7, 20-21 (2010) (per curiam order). This is because a proposed substitute-appellant must be adversely affected by the Board decision on appeal, meaning that a proposed substitute-appellant must be able to take from any award that derives from a potentially successful appeal before the Court. *See* 38 U.S.C. § 7266(a). Here, concurrent with the proposed substitute-appellant's June 2022 motion for substitution before this Court, she submitted to the agency a VA Form 21-0847, Request for Substitution of Claimant Upon Death of Claimant, asserting that she bore the last expenses for the appellant under 38 U.S.C. § 5121(a)(6). The proposed substitute-appellant was subsequently informed that the proper form to seek accrued benefits under section 5121(a)(6) was a VA Form 21-601, Application for Accrued Amounts due a Deceased Beneficiary, and she was also informed that the appellant did not have any claims or pending appeals before the agency in which to substitute. During these proceedings, the proposed substitute-appellant has wavered on whether she was seeking substitution or accrued benefits before the agency. But, as noted above, it is only a successful application for accrued benefits that is contemplated by *Breedlove.*

With that in mind, section 5121(c) requires that applications for accrued benefits be filed within one year after the date of death. 38 U.S.C. § 5121(c); *see also* 38 U.S.C. § 5121A(b). In *Merritt*, the Federal Circuit dismissed the appeal as moot because the purported surviving spouse did not preserve her claim for accrued benefits by filing a formal claim within one year of the veteran's death as required by section 5121(c). 965 F.3d at 1361-63 (providing that a formal application is now required and that a survivor can no longer preserve a claim for accrued benefits by filing an informal claim within one year of the veteran's death). Similarly, in *Smith*, this Court recently denied a motion for substitution, vacating the underlying Board decision and dismissing the appeal, because the proposed substitute-appellant failed to timely obtain a determination on accrued benefits eligibility under section 5121 to show that she may be substituted before the Court as an eligible accrued beneficiary as required by *Breedlove*. *Smith*, 35 Vet.App. at 460-61.

Like *Merritt* and *Smith*, here, the proposed substitute-appellant did not submit an application for accrued benefits within one year of the appellant's death under section 5121(c). The appellant passed away on January 27, 2022, giving any potentially eligible accrued beneficiary until January 27, 2023, to file an application for accrued benefits. 38 U.S.C. § 5121(c). While the proposed substitute-appellant filed a June 2022 request for substitution before the agency, through counsel, she did not file an application for accrued benefits before January 27, 2023, on the proper form. This was despite the agency of original jurisdiction (AOJ) providing the proposed substitute-appellant and her counsel, the proper form to seek eligibility as an accrued beneficiary in September 2022 and October 2022, and again with the December 2022 denial of her request for substitution before the agency. Thus, the proposed substitute-appellant did not submit an application for accrued benefits on the proper form before the AOJ's

December 2022 denial of her request for substitution before the agency, which was issued pursuant to the Court's December 2022 Order. Nor did the proposed substitute-appellant submit an application for accrued benefits on the proper form before the expiration of the one-year period ending on January 27, 2023.

This failure is dispositive on the proposed substitute-appellant's motion for substitution before the Court because the proposed substitute-appellant has not shown that she is entitled to the appellant's claim under the applicable statutes and regulations and, thus, she cannot be adversely affected by the Board's decision on appeal. Such a showing is a prerequisite to substitution before a federal court because a proposed substitute-appellant must show that "the applicable substantive law allows the action to survive a party's death." *Merritt*, 965 F.3d at 1360 (internal citations omitted); *see Breedlove*, 24 Vet.App. at 20-21 (providing that substitution before the Court is predicated on a determination by the Secretary as to whether a movant is an eligible accrued-benefits claimant); *see also Nat'l Org. of Veterans Advocs., Inc. v. Sec'y of Veterans Affs.*, 809 F.3d 1359,1362 (Fed. Cir. 2016) (NOVA) (providing that the party moving for substitution bears the burden of showing that substitution is proper). And if the proposed substitute-appellant is not entitled to the appellant's claim under the applicable statutes and regulations, then she cannot be adversely affected by the Board decision on appeal. 38 U.S.C. § 7266(a).

Here, because the proposed substitute-appellant failed to show that she is an eligible accrued-benefits claimant under section 5121, which is a prerequisite for substitution before this Court under *Breedlove*, she failed to show that she is entitled to the appellant's claim under the applicable statutes and regulations. *See NOVA*, 809 F.3d at 1362. The Court should deny the motion for substitution, vacate the Board's decision, and dismiss the appeal because the proposed substitute-appellant did not submit a claim for accrued benefits within one year of

the appellant's death under section 5121(c) and, thus, cannot be adversely affected by the underlying Board decision on appeal.

1. *Breedlove* and Rule 43 of the Court's Rules of Practice and Procedure do not provide that the Court should grant a motion for substitution when the AOJ has found that a proposed substitute-appellant is not an eligible accrued beneficiary, nor do those authorities provide that the Court can review the AOJ's denial before it is the subject of a final Board decision

The Secretary views the Court's first question as having two related components: (1) whether the Court should grant a motion for substitution where the AOJ denies a request for accrued benefits before the agency and (2) whether a proposed substitute-appellant can contest the propriety of the AOJ's denial before the Court before that denial is the subject of a final Board decision. The Secretary submits that *Breedlove* and Rule 43 do not provide that the Court should grant a motion for substitution when the AOJ has found that a proposed substitute-claimant is not an eligible accrued beneficiary, nor do those authorities provide that the Court can review the AOJ's denial before it is the subject of a final Board decision.

First, the Court should not grant a motion to substitute where the AOJ has made the determination that a proposed substitute-claimant is not an eligible accrued beneficiary, and the Secretary opposes substitution based on that determination, because under those circumstances the accrued-benefits status of the proposed substitute-appellant is legitimately in dispute, and eligibility for accrued benefits is a prerequisite for substitution before the Court under *Breedlove*.

Under *Breedlove*, substitution before the Court requires "a determination as to whether a particular movant is an eligible accrued-benefits claimant." 24 Vet.App. at 20. Eligibility as an accrued-benefits claimant is "a factual

determination that . . . must be made by VA in the first instance" and is determined according to 38 U.S.C. § 5121 or through a concession by the Secretary. *Id.* at 20-21; *see* 38 U.S.C. §§ 5121, 5121A(b). Section 5121 provides that a person seeking accrued benefits must file an "[a]pplication[] for accrued benefits . . . within one year after the date of [the original claimant's] death." 38 U.S.C. § 5121(c); *see Breedlove*, 24 Vet.App. at 21; *see also Smith*, 35 Vet.App. at 460-61 (denying a motion for substitution where there was no timely application for accrued benefits). Moreover, although the Court may substitute an eligible accrued-benefits beneficiary on the death of an appellant, "if the accrued-benefits status of a person seeking substitution legitimately is in dispute, the Court may deny substitution, vacat[e] the Board decision and dismiss[] the appeal," as "the granting of substitution is based not only on the interest of the potential accrued-benefits beneficiary in the outcome of the [appellant's] appeal, but also on considerations of delay, unfairness, and inefficiency, and those considerations may weigh in favor of letting the accrued-benefits claim be adjudicated below de novo." *Breedlove*, 24 Vet.App. at 21.

Where the AOJ has made the determination that a proposed substitute-appellant is not an eligible accrued beneficiary, and the Secretary opposes substitution based on that determination, the Court should deny a motion for substitution because the accrued-benefits status of the proposed substitute-appellant is legitimately in dispute. *See Breedlove*, 24 Vet.App. at 21. And if there is a legitimate dispute about the accrued-benefits status of the proposed substitute-appellant, the Court should vacate the Board's decision and dismiss the appeal and allow that dispute to be addressed before the agency through the administrative appeals process. *Id.* This is because, in part, the Court cannot make the factual determination of a person's accrued-benefits eligibility. *See id.* at 20-21 ("[Eligibility for accrued benefits] is a factual determination that . . . must be

made by VA in the first instance."); *Hensley v. West*, 212 F.3d 1255, 1263 (Fed. Cir. 2000) ("[A]ppellate tribunals are not appropriate fora for initial fact finding."). There is no prejudice to a proposed substitute-appellant if the Court vacates the Board decision and dismisses the appeal because the Court is only vacating the Board's adverse decision on the *appellant's claim*, which in turn would allow a proposed substitute-appellant to pursue accrued benefits before the agency should the Board deem them eligible to do so. *See id*. at 20-21.

Additionally, Rule 43 is "simply a procedural mechanism for substitution." *Smith*, 35 Vet.App. at 463. "[P]rocedural rules . . . do not resolve the question of what law of survival of actions should be applied in a case . . . but simply describe the manner in which parties are to be substituted." *Merritt,* 965 F.3d at 1360 (internal alterations and quotations omitted). And "[b]y allowing substitution 'to the extent permitted by law,' Rule 43(a)(2) explicitly leaves the substantive standard for substitution to be filled in by other authorities." *Smith*, 35 Vet.App. at 463. Thus, if a proposed substitute-appellant's status as an eligible accrued beneficiary is legitimately in dispute, the Court's procedural Rule 43 does not help resolve the question of whether the proposed substitute-appellant can be substituted before the Court, nor does it provide the Court with legal authority to resolve that dispute. It is merely a procedural mechanism for substitution that recognizes the legal principles governing substitution exist elsewhere.

Second, the Court cannot review the AOJ's denial of eligibility to accrued benefits before it is the subject of a final Board decision. The Court's jurisdiction is limited by statute. 38 U.S.C. § 7252(a). The Court has "exclusive jurisdiction to review decisions of the Board of Veterans' Appeals" and the "power to affirm, modify, or reverse a decision of the Board or to remand the matter, as appropriate." *Id.*; *see* 38 U.S.C. § 7266(a) (providing a person obtains review of a "final decision" of the Board by filing a timely notice of appeal). Thus, because the Court's

jurisdiction is limited to the review of final decisions of the Board, it cannot review the AOJ's denial of eligibility for accrued benefits, which is an appealable issue that has not been the subject of a final Board decision. And, as noted above, the Court's jurisdictional limitation does not prejudice a proposed substitute-appellant because they can still pursue accrued benefits before VA. *See Breedlove*, 24 Vet.App. at 20-21.

Here, to the extent the proposed substitute-appellant takes issue with the propriety of the AOJ's denial, her proper administrative recourse is to file an appeal of that decision, obtain a final Board decision, and if she so chooses, appeal that decision to the Court. Neither the Court's rules nor caselaw permit her to bypass the appellate process.

Even ignoring this jurisdictional limitation, if the Court were to review the AOJ's denial without a final Board decision first on the matter, such review would be interlocutory in nature given the appealability of these AOJ determinations through an administrative appeal. And "this Court has long held that it cannot hear interlocutory appeals or otherwise conduct appellate review of Board decisions that are not final, such as remands[.]" *Young v. Shinseki*, 25 Vet.App 201, 208 (2012) (Lance, J., dissenting). Thus, it would be improper for the Court to review the propriety of the AOJ's denial of a proposed substitute-appellant's eligibility for accrued benefits before that determination is the subject of a final Board decision within the Court's jurisdiction under section 7252.

2. *Merritt* is relevant to the extent that, under similar facts, it found that a proposed substitute-appellant's failure to submit a timely application for accrued benefits was dispositive on a motion for substitution

Merritt is relevant to whether the Court should grant a motion for substitution where the AOJ denies a request for accrued benefits before the agency because, under similar facts as here, it found that the purported surviving spouse's failure to

submit a timely application for accrued benefits under section 5121 was dispositive on her motion for substitution before the Federal Circuit. *See* 965 F.3d at 1360-62. In reaching that conclusion, the Federal Circuit found that failure to submit a timely application for accrued benefits could not be excused, noting the timing and form requirements for seeking accrued benefits. *Id*. at 1361. Thus, under *Merritt*, and as noted at the outset for this case, the Court should deny a proposed substitute-appellant's motion for substitution, vacate the underlying Board decision, and dismiss the appeal before the Court where a proposed substitute-appellant did not submit an application for accrued benefits within one year of the appellant's death under section 5121(c).

The Secretary also notes that *Merritt* does not appear to be relevant to whether a proposed substitute-appellant can contest the propriety of the AOJ's denial before this Court before that denial is subject of a final Board decision. But, as noted above, and in this case, that determination has not been the subject of a final Board decision within the Court's jurisdiction under section 7252.

3. The Court has the authority to prescribe the timing, but not the manner, of the AOJ's adjudication of an application for accrued benefits

The Court has the authority to prescribe the timing, but not the manner, of the AOJ's adjudication. In *Breedlove*, the Court found that it may "direct the Secretary to inform the Court of his determination [as to whether a particular movant is an eligible accrued-benefits claimant] within a set period of time." 24 Vet.App at 21. But the Secretary highlights that there are "factual determination[s]," *id.*, that may require development or other clarification from the movant. Examples of such development could include confirmation of status as the veteran's surviving spouse, confirmation that the movant meets the definition of "child," and confirmation of how much and who bore the expenses of last sickness and burial, to include whether any of that was already reimbursed through

other benefits such as burial benefits. With that in mind, if the Court were to prescribe a deadline for adjudication despite the need for additional development, the AOJ may need to issue a determination on procedural rather than substantive grounds.

Thus, while the Court found in *Breedlove* that it could prescribe the timing of an AOJ determination, the Secretary respectfully cautions that such orders should be used sparingly as they may limit the AOJ's ability to fully adjudicate a movant's eligibility for accrued benefits. To the extent the Court is concerned that not prescribing the timing of an AOJ decision could lead to significant delays in the AOJ's adjudication of a movant's eligibility for accrued benefits, the All Writs Act already affords the Court the authority to issue writs of mandamus compelling agency action in aid of its prospective jurisdiction where certain factors have been satisfied.

Moreover, even if the Court may prescribe the timing, the Court may not prescribe the manner of the AOJ's adjudication because Congress gave the Secretary the "authority to prescribe all rules and regulations which are necessary or appropriate to carry out the laws administered by the Department and are consistent with those laws, including . . . the manner and form of adjudications and awards." 38 U.S.C. § 501(a)(4). As noted above, the Court has "exclusive jurisdiction to review decisions of the Board of Veterans' Appeals" and the "power to affirm, modify, or reverse a decision of the Board or to remand the matter, as appropriate." 38 U.S.C. § 7252(a). This does not include the authority to prescribe the manner of the AOJ's adjudication of an application for accrued benefits.

WHEREFORE, the Secretary respectfully submits this supplemental memorandum of law pursuant to the Court's January 20, 2023, Order.

Respectfully submitted,

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