

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

IN THE MATTER OF )  
HERBERT N. HASKELL, II, )  
 )  
Appellant, )  
 )  
v. )  
 )  
DENIS MCDONOUGH, )  
Secretary of Veterans Affairs, )  
 )  
Appellee. )

Vet. App. No. 22-1018

**MOTION TO SUBSTITUTE MAGGIE LASKA AS APPELLANT**

Maggie Laska, surviving spouse of the deceased Veteran, Herbert N. Haskell, II, moves the Court for an order pursuant to Rule 43(a)(2) substituting her as appellant in this case. 38 U.S.C. §§ 5121(a)(2)(A), 5121A. Mr. Haskell passed away on August 14, 2023.<sup>1</sup> Counsel learned of Mr. Haskell’s death on August 14, 2023, and notified the Court of his death the same day.

The appeal should not be dismissed because Ms. Laska is an eligible party for substitution under 38 U.S.C. §§ 5121(a)(2)(A), 5121A(a). *See* Exhibit 1 (Oct. 2014 VA notification letter recognizing “Maggie” as the Veteran’s spouse). She also has standing because she is adversely affected by the Board’s decision in this case.

Further, the Court should hold oral argument currently scheduled for August 15,

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<sup>1</sup> As Mr. Haskell passed away only this morning, a death certificate has not been issued yet. Counsel will provide the Court with a copy of the death certificate as soon as possible.

2023, while this motion is pending.

Two statutes guide the determination of whether an individual may properly be substituted during the pendency of an appeal to this Court: 38 U.S.C. § 5121 and 38 U.S.C. § 5121A. Section 5121A states:

If a claimant dies while a claim for any benefit under a law administered by the Secretary, or an appeal of a decision with respect to such a claim, is pending, a living person who would be eligible to receive accrued benefits due to the claimant under section 5121(a) of this title may, not later than one year after the date of the death of such claimant, file a request to be substituted as the claimant for the purpose of processing the claim to completion.

38 U.S.C. § 5121A.

Although 38 U.S.C. § 5121A is not directly applicable to this Court, its enactment altered the underpinnings of the Court's jurisprudence on substitution during a Court appeal: a veteran's disability benefits claim no longer dies with the veteran, and the accrued benefits claim by a survivor no longer represents a separate interest that must be pursued apart from the veteran's underlying claim for benefits. *Breedlove v. Shinseki*, 24 Vet.App. 7, 8, 20 (2010). Rather, "[a] veteran's chapter 11 disability benefits claim survives the death of the veteran . . . for purposes of furthering the processing of the claim of an eligible accrued-benefits claimant." *Id.* at 8.

Under 38 U.S.C. § 5121A, if a claimant dies while an appeal is pending, a living person who would be eligible to receive accrued benefits due and unpaid to the claimant under 38 U.S.C. § 5121(a) may "file a request to be substituted as the

claimant for the purposes of processing the claim to completion.” Ms. Laska satisfies the requirements under the statute. The Veteran, Mr. Haskell, passed away during the pendency of this appeal on August 14, 2023. *See* 38 U.S.C. § 5121A. And, as explained herein, Ms. Laska is a living person who would be eligible to receive accrued benefits due under section 5121(a)(2)(A) because she is Mr. Haskell’s surviving spouse. *See* 38 U.S.C. § 5121(a)(2)(A); *see also* Exhibit 1.

As a result, there can be no *legitimate* dispute that she is eligible as a proper substitute for the deceased Veteran under 38 U.S.C. 5121(a)(2)(A). *See Breedlove*, 24 Vet.App. 20-21 (holding that the Court will obtain from the Secretary a determination as to whether a particular movant is an eligible accrued-benefits claimant). She is therefore entitled to accrued benefits in this case as set forth in 38 U.S.C. § 5121(a)(2)(A), and the Court should find that she is a proper substitute for this appeal.

In addition to meeting the requirements under the statutes, the party moving for substitution must have standing. Although not formally bound by the “case or controversy requirement,” this Court adheres to it. *Padgett v. Nicholson*, 473 F.3d 1364, 1370 (Fed. Cir. 2007). Ms. Laska has standing and meets the case or controversy requirement because she is adversely affected by the Board decision on appeal. *See Breedlove*, 24 Vet.App. at 20. The Board denied entitlement to special monthly compensation based on aid and attendance under SMC(t) for a traumatic brain injury in its January 27, 2022, decision. If the Court vacates the Board’s denial and, on remand, VA grants entitlement to that benefit, Ms. Laska may be entitled to

accrued benefits due and payable as a result.

Because there could be an award of accrued disability compensation resulting from the special monthly compensation claim, Ms. Laska was injured and has standing to continue the claim. 38 U.S.C. § 5121A.

Though Ms. Laska has not yet filed a claim for accrued benefits with the Regional Office, she plans to do so as soon as possible. And because the Veteran has just passed on today's date, the time for doing so has not yet expired. *See* 38 U.S.C. § 5121(c). In *Matwikiszyn v. Wilkie*, the Federal Circuit substituted the deceased veteran's sons in the appeal, even though there was no indication that the VA had made a determination as to the sons' eligibility to substitute. 835 F.App'x 567, 569 n.3 (Fed. Cir. 2020).<sup>2</sup> The Federal Circuit explained, "[t]his is permissible as the one-year period to file a formal claim with the Department of Veterans Affairs has not yet run, and substitution is separate from considerations of standing and does not itself establish entitlement." *Id.* (citing *Merritt v. Wilkie*, 965 F.3d 1357, 1360-62 (Fed. Cir. 2020)). Likewise, here, the one-year period for Ms. Laska to file a request to substitute her husband at the agency has not yet passed, and the Court can and should permit her to substitute for him in this appeal. *See id.*

Counsel for the Appellee takes no position on this motion until the Regional

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<sup>2</sup> Although this case is not precedential, Ms. Laska cites this memorandum decision for the persuasive value of its logic and reasoning regarding whether a relationship exists due to other individuals' effort as opposed to the claimant's because there are no binding authorities on point. *See* U.S. Vet. App. R. 30(a).

Office makes a determination as to Ms. Laska's eligibility as an accrued benefits beneficiary.

The Secretary's inability to concede at this time that the Veteran's spouse, Ms. Laska, is the proper substitute appellant should not affect the scheduling of oral argument in this case. Oral argument is scheduled for August 15, 2023, tomorrow's date. Though the Veteran's death may affect the Court's ability to issue a decision in this case, it does not affect the Court's ability to take further procedural steps in the appeal, such as holding oral argument. Furthermore, it is likely that substitution will ultimately be granted in this case because there is no valid dispute that Ms. Laska was the Veteran's spouse. *See* Exhibit 1. Therefore, the Court should hold oral argument on the currently scheduled date while this motion is pending before it.

**WHEREFORE**, Maggie Laska moves the Court to substitute her in the instant appeal as Appellant. A new fee agreement will be filed as soon as possible.<sup>3</sup>

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<sup>3</sup> In light of Mr. Haskell's very recent passing, a new fee agreement has not yet been obtained.

Respectfully submitted,

/s/ Amy Odom  
Amy Odom

/s/ Brittani Howell  
Brittani Howell

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Counsel for Appellant

## DEPARTMENT OF VETERANS AFFAIRS

OCTOBER 22, 2014

HERBERT N HASKELL  
[REDACTED]

In Reply Refer To: [REDACTED]

HASKELL, H N

Dear Mr. Haskell:

We made a decision on your Notice of Disagreement received on October 9, 2012, as well as on your dependency claim received on December 18, 2012.

This letter tells you about your entitlement amount and payment start date and what we decided. It includes a copy of our rating decision that gives the evidence used and reasons for our decision. We have also included information about additional benefits, what to do if you disagree with our decision, and who to contact if you have questions or need assistance.

**Your Award Amount and Payment Start Date**

Your monthly entitlement amount is shown below:

Total VA Benefit	Amount Withheld	Amount Paid	Effective Date	Reason For Change
\$3,423.00	\$238.00	\$3,185.00	Nov 1, 2011	Special Monthly Compensation Adjustment, Withholding Adjustment due to Incompetency Proposal
3,545.00	247.00	3,298.00	Dec 1, 2011	Cost of Living Adjustment, Withholding Adjustment due to Incompetency Proposal
3,700.00	402.00	3,298.00	Nov 1, 2012	Change in Spouse Status, Withholding Adjustment due to Incompetency Proposal
3,761.00	409.00	3,352.00	Dec 1, 2012	Cost of Living Adjustment, Withholding Adjustment due to Incompetency Proposal
3,817.42	415.14	3,402.28	Dec 1, 2013	Cost of Living Adjustment,

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Haskell, Herbert N

				Withholding Adjustment due to Incompetency Proposal
3,817.42	0.00	3,817.42	Nov 1, 2014	Withholding of retroactive benefits due to incompetency proposal terminates

We are paying you as a veteran with one dependent. Your payment includes an additional amount for your spouse, Maggie. *Let us know right away if there is any change in your marital status (for example, death, divorce, annulment).*

### You Can Expect Payment

Your payment begins the first day of the month following your effective date. You will receive a payment covering the initial amount due under this award, minus any withholdings. Thereafter, payment will be made at the beginning of each month for the prior month. For example, benefits due for May are paid on or about June 1.

**Your payment will be directed to the financial institution and account number that you specified. To confirm when your payment was deposited, please contact that financial institution.**

***If this account is no longer open,  
please notify us immediately.***

### We Have Withheld Benefits

We are withholding your retroactive benefits as a finding of incompetency has been proposed. VA regulations dictate that no retroactive benefits may be released until the issue of incompetency has been resolved. Once a determination is made regarding your ability to manage your affairs, all retroactive benefits will be released. Until such time, you will continue to receive your monthly benefit on a recurring basis.

### What We Decided

Entitlement to special monthly compensation based on aid and attendance criteria being met is granted from October 24, 2011.



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Haskell, Herbert N

A finding of incompetency is proposed. You will be advised regarding this proposal in a separate letter.

Your spouse, Maggie, was established as a dependent on your award, effective October 20, 2012.

Your overall or combined rating is 100%. We do not add the individual percentages of each condition to determine your combined rating. We use a combined rating table that considers the effect from the most serious to the least serious conditions.

We have enclosed a copy of your Rating Decision for your review. It provides a detailed explanation of our decision, the evidence considered, and the reasons for our decision. Your Rating Decision and this letter constitute our decision based on your claim received on October 9, 2012. It represents all claims we understood to be specifically made, implied, or inferred in that claim.

We enclosed a VA Form 21-8760, "Additional Information for Veterans with Service-Connected Permanent and Total Disability," which explains certain factors concerning your benefits.

We enclosed a VA Form 21-8764, "Disability Compensation Award Attachment-Important Information," which explains certain factors concerning your benefits.

### **Evidence Used to Decide Your Claim**

In making our decision, we used the following evidence:

- VA Form 21-686c dated November 27, 2012.
- VA Form 21-686c dated December 10, 2012.
- Review of entire claims folder.

### **Are You Entitled to Additional Benefits?**

Your combined evaluation is 30 percent or more disabling; therefore, you may be eligible for additional benefits based on dependency. If you wish to submit a claim for dependents, please complete and return the attached VA Form 21-686c, Declaration of Status of Dependents. Please fill out every blank on the form.

Send the information or the evidence to the address at the top of this letter. Please put your full name and VA file number on the evidence.

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Haskell, Herbert N

We may be able to pay you from the date we received your claim, if we receive the information or evidence within one year from the date of this letter and we decide that you are entitled to VA benefits. If we do not receive the evidence within one year from the date of this letter, we can only pay you from the date we receive the evidence.

The Department of Education provides a program for Veterans to discharge their student loans. To be eligible, the Veteran must have a service-connected disability(ies) that is 100% disabling, or be totally disabled based on an Individual Unemployability determination. For more information concerning this benefit, please contact the U.S. Department of Education, Disability Discharge Loan Servicing Center P.O. Box 5200 Greenville, TX 75403-5200 or toll free at 1-800-433-7327. Visit their website at <http://ifap.ed.gov/disabilitydischarge/va.html>.

You may be able to receive vocational rehabilitation employment services. The enclosed VA Form 28-8890, "Important Information About Vocational Rehabilitation Benefits," explains this benefit completely. To apply for this benefit, complete and return the enclosed VA Form 28-1900, "Disabled Veterans Application for Vocational Rehabilitation."

You may be eligible for medical care by the VA health care system for any service connected disability. You may apply for medical care or treatment at the nearest medical facility. If you apply in person, present a copy of this letter to the Patient Registration/Eligibility Section. If you apply by writing a letter, include your VA file number and a copy of this letter.

Because of the rating action described in this letter, you may be eligible to have your government life insurance premiums waived. (This doesn't apply if you have Veterans Group Life Insurance [VGLI]). *If your answer is "yes" to all of the following questions, you should contact the VA Insurance Center at the following toll free telephone number in order to request a "waiver of premiums" on your government life insurance policy. Call 1-800-669-8477.*

- Do you have an active government life insurance policy?
- Do you currently pay premiums for your government life insurance policy?
- Are you considered to be unemployable, or are you rated 100% disabled by VA?
- Were you under age 65 when you became unable to work or 100% disabled?

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Haskell, Herbert N

Your dependents may be eligible for benefits under CHAMPVA. CHAMPVA is a health benefits program in which the Department of Veterans Affairs (VA) shares the cost of certain healthcare and supplies with eligible beneficiaries. To be eligible for the CHAMPVA program a dependent must be the spouse or child of a veteran who is permanently and totally disabled from a service-connected disability. The Health Administration Center in Denver, Colorado administers the CHAMPVA program. You should call 1-800-733-8387 if additional information is needed.

You may be entitled to Armed Forces Commissary and Exchange privileges. Honorably discharged veterans evaluated as 100 percent disabled due to service-connected disability; or, Medal of Honor recipients; or, military retirees and their dependents may qualify for entitlement to this additional benefit.

### **What You Should Do If You Disagree With Our Decision**

If you do not agree with our decision, please download and complete VA Form 21-0958, "Notice of Disagreement". You can download the form at <http://www.va.gov/vaforms> or you can call us at 1-800-827-1000. You have *one year from the date of this letter to appeal the decision*. The enclosed VA Form 4107, "Your Rights to Appeal Our Decision," explains your right to appeal.

### **What Is eBenefits?**

eBenefits provides electronic resources in a self-service environment to Servicemembers, Veterans, and their families. Use of these resources often helps us serve you faster! Through the eBenefits website you can:

- Submit claims for benefits and/or upload documents directly to the VA
- Request to add or change your dependents
- Update your contract and direct deposit information and view payment history
- Request a Veterans Service Officer to represent you
- Track the status of your claim or appeal
- Obtain verification of your military service, civil service preference, or VA benefits
- And much more!

Enrolling in eBenefits is easy. Just visit [www.eBenefits.va.gov](http://www.eBenefits.va.gov) for more information. If you submit a claim in the future, consider filing through eBenefits. Filing electronically, especially if you participate in our fully developed claim program, may result in faster decision than if you submit your claim through the mail.

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Haskell, Herbert N

### If You Have Questions or Need Assistance

If you have any questions, you may contact us by telephone, e-mail, or letter.

<b>If you</b>	<b>Here is what to do.</b>
Telephone	Call us at 1-800-827-1000. If you use a Telecommunications Device for the Deaf (TDD), the Federal number is 711.
Use the Internet	Send electronic inquiries through the Internet at <a href="https://iris.va.gov">https://iris.va.gov</a> .
Write	Put your full name and VA file number on the letter. Please send all correspondence to the address indicated on the enclosed attachment.

In all cases, be sure to refer to your VA file number [REDACTED]

If you are looking for general information about benefits and eligibility, you should visit our website at <https://www.va.gov>, or search the Frequently Asked Questions (FAQs) at <https://iris.va.gov>.

We sent a copy of this letter to your representative, American Legion, whom you can also contact if you have questions or need assistance.

Thank you for your service.

Sincerely yours,  
Regional Office Director

Enclosure(s): Rating Decision of 09/22/14

VA Form 21-8760

VA Form 21-8764

VA Form 21-686c

VA Form 28-1900

VA Form 28-8890

VA Form 4107

Where to Send Your Written Correspondence

cc: American Legion (74)