

Not published

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 22-1018

HERBERT N. HASKELL, II,

APPELLANT,

v.

DENIS McDONOUGH,
SECRETARY OF VETERANS AFFAIRS,

APPELLEE.

Before BARTLEY, *Chief Judge*, and FALVEY and LAURER, *Judges*.

ORDER

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

On February 18, 2022, veteran Herbert N. Haskell, II, appealed a January 27, 2022, decision of the Board of Veterans' Appeals (Board). On June 29, 2023, the case was submitted to a panel of this Court for consideration. Oral argument is scheduled for August 15, 2023, at the University at Buffalo School of Law.

On August 11, 2023, veteran's counsel notified the Court that the veteran began receiving hospice care and was expected to pass away in a few days. On August 14, 2023, counsel notified the Court that the veteran passed away that day. Simultaneous to the notification of death, Mr. Haskell's spouse, Margaret Laska, filed a motion to substitute as the appellant. In her motion, Ms. Laska stated that no death certificate had been issued yet, but that once it is issued, she would submit it to the Court.

"If a party dies . . . while a proceeding is pending in the Court, the personal representative of the deceased party's estate or any other appropriate person may, to the extent permitted by law, be substituted as a party on motion by such person." U.S. VET. APP. R. 43(a)(2). Additionally, upon the death of an appellant, "proceedings will then be as the Court directs." *Id.* The Court directs that on August 15, 2023, oral argument will proceed as provided in the Court's July 17, 2023, order.

When an appellant dies during the pendency of an appeal for disability compensation under chapter 11 of title 38, U.S. Code, the appropriate remedy is to set aside the appealed Board decision and dismiss the appeal unless there has been an appropriate substitution by a qualified accrued-benefits claimant. *See Padgett v. Nicholson*, 473 F.3d 1364, 1366 (Fed. Cir. 2007) (holding that this Court is not obligated to withdraw decision when party died before decision issued, but after case submitted to Court); *Zevalkink v. Brown*, 102 F.3d 1236, 1243-44 (Fed. Cir. 1996); *Landicho v. Brown*, 7 Vet.App. 42, 54 (1994); *see also Breedlove v. Shinseki*, 24 Vet.App. 7, 20 (2010) (per

curiam order) (holding that a veteran's chapter 11 disability benefits claim survives the death of the veteran, not for the purpose of providing VA benefits to a veteran, but for purpose of furthering the claim of an eligible accrued-benefits claimant).

The Court notes that in her August 14, 2023, motion to substitute, Ms. Laska affirmed that she will file with VA a claim for accrued benefits. Additionally, she affirmed that she will file Mr. Haskell's death certificate with the Court when it becomes available.

Further, whether a particular movant 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." *Breedlove*, 24 Vet.App. at 20-21. Thus, within 30 days after Ms. Laska's response to this order, the Secretary must respond to Ms. Laska's August 14, 2023, motion for substitution.

Upon consideration of the foregoing, it is

ORDERED that oral argument set for August 15, 2023, at University at Buffalo School of Law will proceed as scheduled. It is further

ORDERED that Ms. Laska, within 30 days after the date of this order, submit a copy of the veteran's death certificate and indicate the actions she has taken before VA. It is further

ORDERED that the Secretary, within 30 days after Ms. Laska's response, file a response to Ms. Laska's motion to substitute.

DATED: August 14, 2023

PER CURIAM.

Copies to:

Zachary M. Stolz, Esq.

VA General Counsel (027)