

Purnell v. Shinseki

United States Court of Appeals for Veterans Claims

March 28, 2014, Decided

No. 13-3437

Reporter

2014 U.S. App. Vet. Claims LEXIS 486 *

M. Ann Purnell, Appellant, v. Eric K. Shinseki, Secretary of Veterans Affairs, Appellee.

Judges: Before DAVIS, Judge.

Notice: DESIGNATED FOR ELECTRONIC PUBLISHING ONLY.

PURSUANT TO U.S. VET. APP. R. 30(a), THIS ACTION MAY NOT BE CITED AS PRECEDENT.

Opinion by: DAVIS

Opinion

Case Summary

Overview

HOLDINGS: [1]-A widow of a deceased veteran was not entitled to appeal the dismissal of the veteran's appeal of a denial of disability benefits since the veteran's appeal was properly dismissed upon the veteran's death, and the widow retained the right to seek substitution for the veteran and pursue a claim for accrued benefits.

Outcome

Appeal dismissed.

Counsel: [*1] For M. Ann Purnell, Appellant: Sean A. Kendall, Esq., Attorney, Boulder, CO.

For Eric K. Shinseki, Secretary of Veterans Affairs, Appellee: James R. Drysdale, Esq., Attorney, Department of Veterans Affairs, OGC (027H), Washington, DC; OGC-ICM7, Non-Attorney, Department of Veterans Affairs, OGC (027), Washington, DC.

MEMORANDUM DECISION

DAVIS, *Judge*: M. Ann Purnell, widow of veteran James A. Purnell, appeals through counsel from a November 26, 2013, Board of Veterans' Appeals (Board) decision dismissing her husband's appeal for benefits for an acquired psychiatric disorder and a right hip disability, and denying his request to reopen his claim for benefits for necrosis of the left hip. For the following reasons, Mrs. Purnell's appeal will be dismissed.

I. BACKGROUND

Veteran James A. Purnell died in August 2013, while his claim for benefits was pending before the Board. After receiving notification of his death, the Board dismissed Mr. Purnell's appeal on November 26, 2013. On December 5, 2013, Mrs. Purnell filed pro se a Notice of Appeal from the Board's November 2013 decision dismissing her husband's appeal. Subsequently, the Court ordered Mrs. Purnell to show cause [*2] why the Court should not dismiss her appeal. In February 2014, counsel entered an appearance for Mrs. Purnell and filed a response.

II. ANALYSIS

Mrs. Purnell argues that the Board improperly dismissed her late husband's appeal as moot. Specifically, she contends that the November 2013 Board decision was unfavorable, she is a

qualified accrued benefits beneficiary who should be substituted in the appeal, and the dismissal of this appeal will cause her unnecessary delay and complications. Mrs. Purnell stated that she had submitted a request for substitution to the VA regional office (RO) in Columbia, South Carolina, where the claim arose.

When an appellant dies while his appeal is pending before the Board, the appeal will be dismissed. 38 C.F.R. § 20.1302 (2013). Notwithstanding the dismissal,

[i]f 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 [*3] for the purposes of processing the claim to completion.

38 U.S.C. § 5121A(a)(1)¹; see *Breedlove v. Shinseki*, 24 Vet.App. 7, 20 (2010) (per curiam order) (holding that, "based on the enactment of section 5121A, 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 the purpose of furthering the claim of an eligible accrued-benefits claimant").

When a motion for substitution is timely filed and subsequently granted by the agency of original jurisdiction (AOJ) after the appeal has been dismissed by the Board, the appeal will be reinstated for the purpose of furthering the accrued benefits claim. See VA Fast Letter 10-30 at 3 (Aug. 10, 2010) (LexisNexis, *Veterans Benefits Manual and Related Laws and Regulations*, 2013 ed.) ("If found eligible for substitution, either by the AOJ in the first instance or on appeal to the Board, the substitute claimant will receive the same docket number that was assigned to the original claimant's appeal."), 6 (explaining that the Board [*4] dismissal "will specifically note that the dismissal of the appeal does not affect the right of an eligible person to file a request to be substituted as the appellant for the purposes of processing the claim to completion"); *Substitution in Case of Death of Claimant*, 76 Fed. Reg. 8666, 8671 (proposed Feb. 15, 2011) (proposing to amend § 20.1302 "to specify that an appeal pending before the Board when the appellant dies will be dismissed 'without prejudice'" in order to "allow the appeal to continue following a grant of a request to substitute");² see

also *Breedlove, supra*.

Here, Mr. Purnell died while his appeal was pending before the Board, and the Board properly dismissed it. See 38 C.F.R. § 20.1302. The Board explained that the dismissal "does not affect the right of an eligible person to file a request to be substituted as the appellant for purposes of processing the claim to completion." James A. Purnell, BVA 10-22299 (Nov. 26, 2013). Because Mrs. Purnell has filed a motion to substitute with the Columbia, South Carolina RO, if the RO denies her motion to substitute, she may appeal that determination to the Board [*5] and, if necessary, to the Court. See VA Fast Letter 10-30 at 3 ("Any adverse AOJ determination as to basic eligibility for substitution will be appealable to the Board."); 38 U.S.C. § 7266(a) (stating that any final Board decision that adversely affects an appellant may be appealed to the Court).

On the other hand, should the RO grant Mrs. Purnell's motion for substitution, her accrued benefits claim will take the place of her late husband's claim for benefits on the Board's docket. See VA Fast Letter 10-30 at 3, 6. In other words, she will not be prejudiced by the Board's November 2013 dismissal currently on appeal to the Court. Unlike cases where the Board has issued an adverse decision on the merits of a deceased's claim, the Board's decision in this case — a dismissal — will not act as an impediment to Mrs. Purnell's accrued benefits claim. See *Landicho v. Brown*, 7 Vet.App. 42, 53-54 (1994) (explaining that the proper remedy when an appellant dies while an appeal is pending before the Court is to dismiss the appeal and vacate the underlying Board decision to prevent that decision "from spawning any legal consequences" (quoting *United States v. Munsingwear, Inc.* 340 U.S. 36, 41, 71 S. Ct. 104, 95 L. Ed. 36 (1950))). [*6] The Board will render a decision on Mrs. Purnell's accrued benefits claim and, if that decision is adverse to her, she may appeal it to the Court. See 38 U.S.C. § 7266(a).

Based on the foregoing, the Court concludes that Mrs. Purnell's appeal is premature. There is no adverse Board decision on the merits for the Court to review. Moreover, Mrs. Purnell has not demonstrated how she was adversely affected by the Board's dismissal of Mr. Purnell's appeal.

III. CONCLUSION

Accordingly, the Court DISMISSES the appeal for lack of jurisdiction.

DATED: March 28, 2014

¹ Although section 5121A and § 20.1302 use the terms "claimants" and "appellants," both are referring to the same class of people.

² VA has not yet published a final version of the proposed regulation.