UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 13-0158

JACK SUCIC, APPELLANT,

V.

DAVID J. SHULKIN, M.D.,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before SCHOELEN, PIETSCH, and GREENBERG, *Judges.*

O R D E R

On August 31, 2016, a motion to substitute the appellant's adult children was filed after the appellant died during the pendency of his appeal at the Court. On January 31, 2017, this matter was sent to a panel to determine whether the appellant's children are eligible accrued benefits beneficiaries under 38 U.S.C. § 5121(a) and therefore qualify for substitution at the Court. For the following reasons, the Court will deny the motion for substitution.

I. BACKGROUND

In June 2007, the appellant was granted service connection for post-traumatic stress disorder (PTSD), effective January 24, 2003. Record (R.) at 893-98. The appellant appealed the effective date of the award. R. at 792-95. In a September 2012 decision, the Board of Veterans' Appeals (Board) denied him entitlement to an effective date earlier than January 24, 2003, for his service-connected PTSD. R. at 2-17. In June 2014, the Court affirmed the Board's decision. *Sucic v. Gibson*, No. 13-0158, 2014 WL 2926475 (U.S. Vet. App. June 30, 2014) (mem. dec.). The appellant appealed to the U.S. Court of Appeals for the Federal Circuit (Federal Circuit). In February 2016, the Federal Circuit reversed the Court's June 2014 decision and remanded the matter for further development and a determination of whether a 1995 Board referral of a previously unadjudicated PTSD claim entitled the appellant to an earlier effective date for PTSD. *Sucic v. McDonald*, 640 F. App'x 901 (Fed. Cir. Feb. 16, 2016). On April 8, 2016, mandate from the Federal Circuit issued. The Court effected the Federal Circuit's holding in May 2016 when it vacated the Board's September 2012 decision and remanded the matter to VA for further development and readjudication. *Sucic v. McDonald*, No. 13-0158, 2016 WL 3035459 (U.S. Vet. App. May 27, 2016) (mem. dec.). On June 20, 2016, judgment entered. On August 22, 2016, mandate issued.

On August 31, 2017,[1] appellant's counsel notified the Court that the appellant had died on April 13, 2016. On the same day, counsel also filed a motion to substitute the appellant's adult children.[2] A panel was formed to address whether substitution is appropriate here.

II. ARGUMENTS

In the motion for substitution, counsel concedes that the appellant's three children are adults. He argues, however, that because "the appeal pending before this Court involves the effective date of Mr. Sucic's [PTSD] claim . . . for the period from June 1992 to January 24, 2003," and the appellant's children were minors for part or all this period, they are eligible accrued benefits beneficiaries under 38 U.S.C. § 5121(a). Motion for Substitution at 3.

The Secretary responds that the Court has held that the term "children" found in 38 U.S.C. § 5121(a)(2)(B) is expressly defined under 38 U.S.C. § 101(4)(A) and none of the appellant's children meets this definition. Secretary's Oct. 27, 2016, Response at 3 (citing *Burris v. Principi*, 15 Vet.App. 348, 352-53 (2001)).

Appellant's counsel argued at oral argument that Congress intended to fundamentally change the accrued benefits framework when it enacted section 5121A to allow any family member who otherwise meets the familial relationship implicated by the term "children" to substitute himself or herself in place of the deceased claimant, regardless of his or her age.[3] Counsel also contended that, regardless of the definition of "child" in section 101(4)(A), the plain and ordinary meaning of the word "children" used in section 5121(a)(2)(B) controls because Congress did not specify that the veteran's children be minors or dependent, but Congress specified in section 5121(a)(2)(C) that a parent must be dependent to qualify as an accrued benefits beneficiary.

The Secretary responded, arguing that neither the plain language of 38 U.S.C. § 5121A nor any other part of the statutory scheme related to accrued benefits beneficiaries supports the appellant's counsel's interpretation. Secretary's Aug. 18, 2017, Supplemental Memorandum of Law at 3-4.

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[1] Although counsel notified the Court on August 31, 2016, of the appellant's April 13, 2016, death, counsel states that he was informed of the death on April 15, 2016, 138 days before he filed a notification with the Court. Judicial resources have been wasted as a result of counsel's delay in notifying the Court of the appellant's death.

[2] Counsel also filed an unopposed motion to recall the Court's judgment and May 27, 2016, memorandum decision.

[3] Although appellant's counsel asserted that this argument was part of his original argument, the Court agrees with the Secretary that a new argument, not previously briefed, was raised at oral argument. Appellant's counsel did not mention this argument or anything resembling this argument in his motion to substitute, supplemental memorandum of law, or notice of supplemental authorities. Appellant's counsel was expressly warned in *Untalan v. Nicholson* that "the Court has repeatedly discouraged parties from raising arguments that were not presented in an initial brief to the Court." 20 Vet.App. 467, 471 (2006) (citations omitted). The Court's admonishment in *Untalan* is clear on its face and not subject to interpretation. Nonetheless, because the Secretary has had the opportunity to respond to this newly raised argument, *see* Secretary's Aug. 18, 2017, Supplemental Memorandum of Law, in the interest of judicial efficiency the Court will address it.

III. LAW

> 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 purposes of processing the claim to completion.

38 U.S.C. § 5121A(a)(1) (emphasis added). "Those who are eligible to make a claim under this section *shall be determined in accordance with section 5121* of this title." 38 U.S.C. § 5121A(b) (emphasis added).

In *Breedlove v. Shinseki*, we held that the enactment of 38 U.S.C. § 5121A, although not directly applicable to this Court, nonetheless "alter[ed] the underpinnings of this Court's jurisprudence on substitution," and 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 purposes of furthering the processing of the claim of an eligible accrued-benefits claimant." 24 Vet.App. 7, 8 (2010).

> Section 5121 of title 38, U.S. Code, states in relevant part:
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> (a) Except as provided in section 3329 and 3330 of title 31, periodic monetary benefits (other than insurance and servicemen's indemnity) under laws administered by the Secretary to which an individual was entitled at death under existing ratings or decisions or those based on evidence in the file at date of death (hereinafter in this section and section 5122 of this title referred to as "accrued benefits") and due and unpaid, shall, upon the death of such individual be paid as follows:
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> (1) Upon the death of a person receiving an apportioned share of benefits payable to a veteran, all or any part of such benefits to the veteran or to any other dependent or dependents of the veteran, as may be determined by the Secretary.
>
> (2) Upon the death of a veteran, to the living person first listed below:
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> (A) The veteran's spouse.
>
> (B) The veteran's children (in equal shares).
>
> (C) The veteran's dependent parents (in equal shares).
>
> (3) Upon the death of a widow or remarried surviving spouse, to the children of the deceased veteran.

> (4) Upon the death of a child, to the surviving children of the veteran who are entitled to death compensation, dependency and indemnity compensation, or death pension.
>
> (5) Upon the death of a child claiming benefits under chapter 18 of this title, to the surviving parents.
>
> (6) In all other cases, only so much of the accrued benefits may be paid as may be necessary to reimburse the person who bore the expense of last sickness and burial.

38 U.S.C. § 5121(a). "No other categories of payee at death are provided in the statute." *Youngman v. Shinseki*, 699 F.3d 1301, 1303 (Fed. Cir. 2012). "Both this Court and . . . the Federal Circuit . . . have repeatedly affirmed VA denials of accrued-benefits claims by persons other than those listed in section 5121(a)." *Morris v. Shinseki*, 26 Vet.App. 494, 499 (2014).

We have also recognized that the term "children" is used in the statute and is controlled by the definition of "child" under 38 U.S.C. § 101(4)(A). *Burris v. Principi*, 15 Vet.App. 348, 352-53 (2001). Section 104(4)(A) provides:

> "[C]hild" means (except for purposes of chapter 19 of this title . . .) a person who is unmarried and—
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> (i) who is under the age of eighteen years;
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> (ii) who, before attaining the age of eighteen years, became permanently incapable of self-support; or
>
> (iii) who, after attaining the age of eighteen years and until completion of education or training (but not after attaining the age of twenty-three years), is pursuing a course of instruction at an approved educational institution.

38 U.S.C. § 101(4)(A).

IV. ANALYSIS

A. Argument in Motion for Substitution

"'Statutory interpretation begins with the language of the statute, the plain meaning of which we derive from its text and structure.'" *Myore v. Nicholson*, 489 F.3d 1207, 1211 (Fed. Cir. 2007) (quoting *McEntee v. M.S.P.B.*, 404 F.3d 1320, 1328 (Fed. Cir. 2005); *see Sharp v. Shinseki*, 23 Vet.App. 267, 271 (2009); *see also McGee v. Peake*, 511 F.3d 1352, 1356 (Fed. Cir. 2008); *Gardner v. Derwinski*, 1 Vet.App. 584, 586 (1991) ("Determining a statute's plain meaning requires examining the specific language at issue and the overall structure of the statute." (citing *Bethesda Hosp. Ass'n v. Bowen*, 485 U.S. 399, 403-05 (1998))), *aff'd sub nom. Gardner v. Brown*, 5 F.3d 1456 (Fed. Cir. 1993), *aff'd*, 513 U.S. 115 (1994). In reviewing "an agency's construction

of the statute which it administers," a court must first ask "whether Congress has directly spoken to the precise question at issue." *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). If so, the court and the agency "must give effect to the unambiguously expressed intent of Congress." *Id*. at 842-43.

In section 5121 of title 38, U.S. Code, Congress stated that an accrued benefits determination is to be made "upon the death of a veteran." 38 U.S.C. § 5121(a)(2). It is clear from the plain language of the statute that to qualify as an accrued benefits beneficiary, an individual must satisfy the requirements of the statutory framework for these benefits when the veteran dies as opposed to at some point during the pendency of the veteran's claim. Consequently, the Court must "give effect" to the intent of Congress and follow the language of the statute. *Chevron U.S.A., Inc.*, 467 U.S. at 842-43. As the Federal Circuit recognized in *National Organization of Veterans Advocates, Inc.* (*NOVA*) *v. Secretary of Veterans Affairs*, "[b]ecause the status of a potential substitute is not static, eligibility to substitute can be conclusively determined *only at the time of the claimant's death*." 809 F.3d 1359, 1362 (Fed. Cir. 2016) (emphasis added); *see id*. (explaining that "[d]ue to death, divorce, or a change in dependency status, the person who appears to be eligible to substitute based on []VA's records may not in fact be eligible"). The Court concludes that the appellant's counsel's argument, that for the definition of "child" the period to consider is attached to the effective date of the relevant claim, is contrary to the intent of Congress as evidenced by the statute's plain language. *See Chevron U.S.A., Inc.*, 467 U.S. at 842-43.

A child of a deceased veteran is therefore eligible for substitution only if he or she satisfies the definition of 38 U.S.C. § 101(4)(A) "upon the death" of the veteran. 38 U.S.C. § 5121(a); *see also Burris*, 15 Vet.App. at 352-53. None of the moving parties have met their burden to establish that they were parties eligible for substitution as a "child" under 38 U.S.C. § 101(4)(A) "upon the death" of the veteran. S*ee NOVA*, 809 F.3d at 1362 (holding that the burden is on the "prospective substitute" to prove eligibility for substitution).

B. Argument Raised at Oral Argument

The Court also concludes that the appellant's counsel has failed to persuade the Court that when it enacted section 5121A, Congress intended to fundamentally change the accrued benefits beneficiary framework. *See Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc) (finding that the appellant bears the burden of persuasion on appeals to this Court), *aff'd per curiam*, 232 F.3d 908 (Fed. Cir. 2000) (table). Congress enacted 38 U.S.C. § 5121A to "improve and modernize VA claims processing." *Breedlove*, 24 Vet.App. at 14. The appellant's counsel has not identified any support for the proposition that Congress intended section 5121A to change anything other than how VA processed its claims, particularly as it relates to the dependency requirements for accrued benefits beneficiaries.

The term "children" in 38 U.S.C. § 5121(a) is defined singularly under 38 U.S.C. § 101(4)(A). *Burris*, 15 Vet.App. at 352-53. The only exception provided for the definition of a child is "for purposes of chapter 19 of [title 38]." 38 U.S.C. § 101(a)(4). The argument that the definition of "children" is different for the purposes of 5121A is also unsupported by the plain language of the substitution statute, which expressly limits the eligibility for substitution to those

listed under 38 U.S.C. § 5121(a). *See* 38 U.S.C. § 5121A(a), (b); *see also Myore*, 489 F.3d at 1211.

Additionally, to support his contention that the appellant's adult children are potential accrued benefits beneficiaries, appellant's counsel relies on the fact that section 5121(a)(2)(C) limits eligibility to a veteran's "dependent parents" and that Congress did not similarly modify the term "children" in section 5121(a)(2)(B). Counsel's contention, however, is belied by the existence of separate definitions for "parent" and "dependent parents" in title 38. 38 U.S.C. §§ 101(5), 102. Only "dependent parents" qualify as eligible accrued benefits beneficiaries under 38 U.S.C. § 5121. *See* 38 C.F.R. § 3.1000(d)(3) (2017) (providing that "[d]ependent parent is as defined in § 3.59: *Provided*, That the mother or father was dependent within the meaning of § 3.250 at the date of the veteran's death); *see also* 38 C.F.R. § 3.59 (2017) (Parent); 38 C.F.R. § 3.250 (2017) (Dependency of parents; compensation). That Congress chose to limit eligibility to only one of the two types of parents recognized under title 38 does not undermine, and in fact, supports our conclusion that the children who qualify under section 5121(a)(2)(B) are the children defined in section 101(4)(A)−i.e., dependent children. *See Morris*, 26 Vet.App. at 499 (noting that "[i]n enacting section 5121, Congress limited eligibility for accrued benefits to the same few categories of dependent family members for who a veteran could seek additional disability compensation while alive.").

Ultimately, the appellant's adult children have not persuaded the Court that they meet the definition of "children" for accrued benefits purposes under section 5121(a), nor have they provided any persuasive argument to allow substitution by persons not listed in this section. *See Morris*, 24 Vet.App. at 499 ("Both this Court and the . . . Federal Circuit . . . have repeatedly affirmed VA denials of accrued-benefits claims by persons other than those listed in section 5121(a)."); *see also Youngman*, 699 F.3d at 1303.

V. CONCLUSION

Although the Court is sympathetic to the appellant's children's loss, because they are not eligible accrued benefits beneficiaries under 38 U.S.C. § 5121(a) and no other person has been alleged to be eligible for substitution, the Court will deny the appellant's children's motion for substitution and dismiss the appeal. Accordingly, it is

ORDERED that the August 22, 2016, mandate is RECALLED. It is further

ORDERED that the June 20, 2016, judgment is REVOKED. It is further

ORDERED that the Court's May 27, 2016, memorandum decision is WITHDRAWN. It is further

ORDERED that the appellant's adult children's motion to recall judgment and the Court's May 27, 2016, memorandum decision is denied as moot. It is further

ORDERED that the appellant's adult children's motion for substitution is denied. It is further

ORDERED that the September 2012 Board decision is VACATED and this appeal is DISMISSED for lack of jurisdiction.

DATED: October 26, 2017 PER CURIAM.