NOTE: This disposition is nonprecedential.

United States Court of Appeals for the Federal Circuit

ANGELA GOLDMAN SELBY,
Claimant-Appellant

v.

DENIS MCDONOUGH, SECRETARY OF VETERANS AFFAIRS,
Respondent-Appellee

2024-1066

Appeal from the United States Court of Appeals for Veterans Claims in No. 22-5763, Judge Joseph L. Falvey, Jr.

Decided: May 7, 2024

ANGELA G. SELBY, Carthage, TX, pro se.

NATALEE A. ALLENBAUGH, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, for respondent-appellee. Also represented by BRIAN M. BOYNTON, MARTIN F. HOCKEY, JR., PATRICIA M. MCCARTHY.

Before LOURIE, PROST, and STARK, *Circuit Judges*.

PER CURIAM.

Angela Goldman Selby appeals from a decision of the United States Court of Appeals for Veterans Claims ("Veterans Court") affirming a Board of Veterans' Appeals ("Board") decision denying her an increased share of her late father's accrued Department of Veterans Affairs ("VA") disability benefits under the provisions of 38 C.F.R. § 3.816. *See Selby v. McDonough*, No. 22-5763, 2023 WL 5746882 (Vet. App. Sept. 6, 2023) ("*Decision*"). We *affirm*.

BACKGROUND

Selby is the adult daughter of Navy veteran James D. Goldman, who served honorably from June 1965 to August 1969. *Decision* at *1; Resp. Br. at 2. In June 2020, Goldman died of kidney failure secondary to bladder cancer. Resp. Br. at 2–3. Goldman is survived by Selby, as well as three other adult children. R.A.[1] 26.

In 2021, Congress added bladder cancer to the list of conditions presumptively associated with exposure to herbicide agents. *See* 38 U.S.C. § 1116(a)(2)(J). In June 2022, a VA regional office ("RO") issued a decision awarding Goldman service connection under the *Nehmer* consent decree for the purpose of retroactive benefits for bladder cancer associated with herbicide exposure. R.A. 9–20; *see also Nehmer v. U.S. Veterans Admin.*, 32 F. Supp. 2d 1175, 1177 (N.D. Cal. 1999) (describing the consent decree). The RO granted service connection with a 100 percent evaluation effective from November 29, 2006 to April 30, 2007, as well as a 100 percent evaluation from January 8, 2008 until his death in 2020. R.A. 21–24. The VA notified Selby that her father was entitled to retroactive benefits of $276,505.02

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[1] "R.A." refers to the appendix filed with Respondent's Brief.

and that she and her three siblings would each receive a one-fourth share of $69,125.25. *Id.*

Selby submitted a timely Notice of Disagreement, alleging that she had been her father's only caregiver and that, based on her father's will, the retroactive benefits should not be divided equally, but instead, paid "mostly, if not all," to her. R.A. 25.

In a September 21, 2022 decision, the Board denied Selby entitlement to an increased share of accrued benefits. R.A. 26–31. As explained by the Board, the "provisions of 38 C.F.R. § 3.816 set forth the class members who may be considered for awards under the *Nehmer* court orders and govern the payment of benefits to survivors or estates of deceased beneficiaries." *Id.* at 28. That regulation sets forth a sequential order in which retroactive benefits are to be paid out upon the death of the veteran entitled to such benefits. First, the veteran's spouse, and next, "the class member's child(ren) regardless of age or marital status (i.e., natural and adopted children and any stepchildren who were members of the class member's household at the time of his death)." *Id.* at 29; *see* 38 C.F.R. § 3.816(f)(i)–(ii).

The Board identified that Goldman had three biological children and one adopted child. R.A. 29. The Board further noted that 38 C.F.R. § 3.816(f)(1)(ii) holds that "if more than one child exists, payment will be made in equal shares [to each child]." R.A. 29 (alteration in original). The Board concluded that the law does not allow the VA to restrict payment of retroactive accrued *Nehmer* benefits only to certain children "regardless of [a] will or the caretaking responsibilities the respective children undertook." *Id.* at 30.

The Veterans Court affirmed that decision. Selby appealed.

DISCUSSION

Our jurisdiction to review decisions of the Veterans Court is governed by 38 U.S.C. § 7292. We review legal determinations, including questions of statutory and regulatory interpretation, *de novo*. *Andre v. Principi*, 301 F.3d 1354, 1358 (Fed. Cir. 2002). Absent a constitutional issue, we may not review a challenge to a factual determination or a challenge to a law or regulation as applied to the facts of a particular case. 38 U.S.C. § 7292(d)(2); *Wanless v. Shinseki*, 618 F.3d 1333, 1336 (Fed. Cir. 2010).

The core issue in Selby's appeal is whether or not the Veterans Court erred in affirming the Board's decision that accrued benefits had to be equally split between Goldman's four children. *Decision* at *1. To the extent that Selby argues that an error arose due to a misinterpretation of 38 C.F.R. § 3.816, we have jurisdiction to decide the issue under 38 U.S.C. § 7292(a). However, Selby has not alleged any specific error on the part of the Veterans Court in interpreting that regulation, and we do not see an error in its analysis.

As the Veterans Court correctly recognized, "a valid regulation governs the distribution of accrued benefits," and "under this regulation, VA was required to distribute benefits to surviving children without regard to what state law or a will had to say about the matter." *Decision* at *1–2 (citing *Morris v. Shinseki*, 26 Vet. App. 494, 508–09 (2014) (holding that when a federal statute or regulation expressly covers the distribution of VA benefits, it displaces the state law governing the division of property)). Federal law thus required the VA to distribute the funds to Goldman's four children in equal shares under 38 C.F.R. § 3.816(f) and the VA complied with that law.

Selby also appears to argue that, because she requested to be substituted as claimant upon her father's death and was the sole beneficiary of his will, the VA should have treated her as if she was her father's only child for the purposes of § 3.816. *See* Appellant's Inf. Br. at 1.

But we lack jurisdiction to review such a claim contesting the law as applied to the particular facts of Selby's case. *See* 38 U.S.C. § 7292(d)(2).

Relatedly, Selby argues that she should be substituted into her father's case, stating that "38 C.F.R. § 3.816 was amended by Congress in 2008 to allow substitution in any case where a veteran dies on or after the Modernization Act of 2008 was passed into law." Appellant's Inf. Br. at 1. She further contends that she "meet[s] all requirements to be considered as a substitution," noting that she filed VA Form 21P-0847, which is the form used for substitution of a claimant upon death of the original claimant, wherein that death occurs before the VA finishes processing a VA claim, decision review, or appeal. *Id.*

But Selby does not appear to have raised an argument regarding substitution before the Veterans Court and we therefore do not have a decision as to substitution to review on appeal. We thus decline to consider such an argument under *Boggs v. West*, 188 F.3d 1335, 1337-38 (Fed. Cir. 1999). But even if Selby were to be substituted into the case, such substitution would not displace the distributions set forth in § 3.816. Substitution grants an eligible accrued-benefits claimant only the opportunity to "process[] the claim to completion" in the deceased veteran's stead. 35 U.S.C. § 5121A(a)(1). It does not affect the way in which accrued benefits are to be distributed once a decision as to those benefits has been reached.

Selby further seems to argue that the RO erred in finding a period of time, specifically, May 1, 2007 to January 7, 2008, non-compensable. Appellant's Inf. Br. at 2. In particular, Selby contends that during that time, Goldman underwent multiple medical procedures relating to his bladder cancer and should have been compensated for that time frame. *Id.* However, Selby does not appear to have adequately raised that argument below, which puts it outside the scope of what is ordinarily appealable under

38 U.S.C. § 7292(a). *See also Emenaker v. Peake*, 551 F.3d 1332, 1337 (Fed. Cir. 2008) ("[A]ppellate courts do not consider issues that were not raised in the tribunal from which the appeal is taken"). We see no reason to diverge from that ordinary practice here.

CONCLUSION

We have considered Selby's remaining arguments and find them unpersuasive. For the foregoing reasons, we *affirm*.

AFFIRMED

COSTS

No costs.

Designated for electronic publication only

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 22-5763

ANGELA GOLDMAN SELBY, APPELLANT,

V.

DENIS MCDONOUGH,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before FALVEY, *Judge*.

MEMORANDUM DECISION

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

FALVEY, *Judge*: Angela Goldman Selby is the daughter of Navy veteran James D. Goldman. Mr. Goldman is deceased. Representing herself, Ms. Selby appeals from a September 21, 2022, Board of Veterans' Appeals decision that denied her a higher share of her father's accrued benefits. The appeal is timely; the Court has jurisdiction to review the decision; and single-judge disposition is appropriate. *See* U.S.C. §§ 7252(a), 7266(2); *Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990).

We are asked whether the Board erred when it found that accrued benefits had to be equally split between Mr. Goldman's four children. Ms. Selby argues that, under Mr. Goldman's will, she is the only one who should have received accrued benefits. She thus makes several arguments for why VA erred in failing to carry out her father's intent. The problem is that a valid regulation governs the distribution of accrued benefits. And under this regulation, VA was required to distribute benefits to surviving children without regard to what state law or a will had to say about the matter. Thus, even as we understand Ms. Selby's disappointment, we affirm the Board decision.

I. ANALYSIS

Ms. Selby is representing herself; thus, we liberally construe all her arguments. *See Perez v. Derwinski*, 2 Vet.App. 85, 86 (1992). She invokes the United States Constitution, the veteran's last will, and Texas state law to challenge the Board decision. Her arguments boil down to her contention that, under the veteran's will, she was the only one entitled to receive funds owed to the veteran. Thus, she reasons that she should be the only one to receive the accrued benefits.

Mr. Goldman died in June 2020. Record (R.) at 581. About two years later, VA issued a rating decision finding that the veteran should have been service connected for bladder cancer due to his herbicide exposure. R. at 207-28. VA's decision was prompted by the inclusion of bladder cancer on the list of diseases eligible for presumptive service connection as well as a review mandated by a United States district court as part of a consent decree in *Nehmer v. U.S. Veterans Admin. See, e.g., Nehmer v. Veterans' Admin. of Government of United States*, 284 F.3d 1158, 1161 (9th Cir. 2002) (affirming the requirement that VA provide retroactive benefits to any class member who submitted a claim for a disease that is later service connected under the Agent Orange Act.).

The *Nehmer* decree is also responsible for how VA paid out the accrued benefits. VA's regulations for how it dispenses benefits to survivors of a deceased veteran stem from

> an order clarifying that if a class member died before receiving full payment of retroactive disability or death compensation after a favorable readjudication pursuant to the consent decree, the VA had to disburse the payment to the first individual or entity in existence listed below:
>
> (a) the class member's spouse;
>
> (b) the class member's children, in equal shares;
>
> (c) the class member's parents, in equal shares;
>
> (d) the class member's estate.

Nehmer v. U.S. Dep't of Veterans Affairs, No. C 86-06160 WHA, 2021 U.S. Dist. LEXIS 218075, at *2 (N.D. Cal. Nov. 10, 2021).

VA implemented this requirement in 38 C.F.R. § 3.816(f). And the regulation mirrors the consent decree. 38 C.F.R. § 3.816(f)(2023). As relevant here, the regulation places surviving children above the veteran's estate when paying benefits owed to a deceased *Nehmer* class veteran. *Id.* And, as required by *Nehmer* and the regulation, VA properly dispensed benefits to the veteran's surviving children.

If Ms. Selby disagrees with the provisions of the *Nehmer* decree or how VA implemented that decree, her remedy is to pursue the matter by petitioning the U.S. District Court for the Northern District of California; that is the court responsible for administering the *Nehmer* decree. *See Constantine v. McDonough*, 35 Vet.App. 81, 82 (2022).

We recognize that Ms. Shelby believes that VA should have followed the veteran's will and was bound by the probate process from Texas. But we have held that when a federal statute or regulation expressly covers the distribution of VA benefits, it displaces the state law governing the division of property. *Morris v. Shinseki*, 26 Vet.App. 494, 508–09 (2014) ("[A]ny property interest the veteran had in his VA benefits did not include the right to have VA accrued benefits due and unpaid at the time of his death paid to heirs by operation of state law."). This same case law disposes of Ms. Selby's argument that the veteran had a property interest in his benefits and that VA violated his due process rights when it distributed that property without following his will. *Id.*

The bottom line is, federal law required VA to distribute the funds to the veteran's children in equal shares. *Id.*; *see also* 38 C.F.R. § 3.816(f). VA complied with the law. Although we understand Ms. Selby's disagreement with the law, it is not this Court's place to strike down otherwise valid regulations simply because we may disagree with them. *See Hembree v. Wilkie*, 33 Vet.App. 1, 6 (2020). Nor is it our place to modify the requirements of the *Nehmer* decree. *Constantine*, 35 Vet.App. at 82. Thus, we affirm the Board decision.

II. CONCLUSION

On consideration of the above, September 21, 2022, Board decision is AFFIRMED.

DATED: September 6, 2023

Copies to:

Angela Goldman Selby

VA General Counsel (027)

BOARD OF VETERANS' APPEALS

FOR THE SECRETARY OF VETERANS AFFAIRS

IN THE APPEAL OF
ANGELA G. SELBY
IN THE CASE OF
JAMES D. GOLDMAN
Appellant Represented by
Texas Veterans Commission

[redacted]
Docket No. 220610-252413
Advanced on the Docket

DATE: September 21, 2022

ORDER

Entitlement to an increased share of accrued benefits is denied.

FINDING OF FACT

The Veteran had four children at the time of his death: A.S., D.G., A.G., and C.G.

CONCLUSION OF LAW

The criteria for an increased portion of accrued benefits to the appellant, A.S., have not been met. 38 U.S.C. § 5121; 38 C.F.R. § 3.816(f), 3.1000.

REASONS AND BASES FOR FINDING AND CONCLUSION

The Veteran served honorably on active duty in the United States Navy from June 1965 to August 1969. He died in June 2020. The appellant, A.S., is his adult daughter, and the Veteran is survived by three other adult children: D.G., A.G., and C.G.

IN THE APPEAL OF
ANGELA G. SELBY
IN THE CASE OF
JAMES D. GOLDMAN

[redacted]
Docket No. 220610-252413
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This matter comes before the Board of Veterans' Appeals (Board) from a June 2022 administrative decision of a Department of Veterans Affairs (VA) Regional Office that granted the appellant one fourth of the accrued benefits owed to the Veteran under the provisions of 38 C.F.R. § 3.816.

In the June 2020 VA Form 10182, Decision Review Request: Board Appeal, the appellant elected the Direct Review docket. Therefore, the Board may only consider the evidence of record at the time of the agency of original jurisdiction (AOJ) decision on appeal. 38 C.F.R. § 20.301. As the appellant is seeking the entirety of the accrued benefits adjudicated by the AOJ in June 2022, which would result in a reduction in benefits to her siblings, this matter represents a simultaneously contested claim. The Board's review of the record indicates the contested claim procedures set forth at 38 C.F.R. §§ 20.400-407 have been met.

Evidence was added to the claims file during a period of time when new evidence was not allowed. As the Board is deciding the appeal for an increased share of accrued benefits, it may not consider this evidence in its decision. 38 C.F.R. § 20.300.

Entitlement to an increased share of accrued benefits

The appellant seeks the entire sum of accrued benefits owed to the Veteran at the time of his death because she contends that she was his sole caregiver for many years leading up to his death without assistance from her siblings. She also has stated that it would have been the Veteran's wish that she be awarded the entire sum and submitted in July 2021 the Veteran's last will and testament naming her as the sole beneficiary of his estate. Although the Board sympathizes with the appellant's position, for the reasons explained below, the Board must deny her appeal for an increased share of accrued benefits as a matter of law.

As an initial matter, the Board notes that the accrued benefits that are the subject of the appellant's appeal arise from a June 2022 rating decision that was the result of a special review of the Veteran's claims file that had been mandated by Federal court order in *Nehmer v. U.S. Department of Veterans Affairs*, 712 F. Supp. 1404 (N.D. Cal. 1989) (Nehmer I). *See also Nehmer v. United States Veterans*

IN THE APPEAL OF
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Administration, 32 F. Supp. 2d 1175 (N.D. Cal. 1999) (Nehmer II); *Nehmer v. Veterans Administration of the Government of the United States*, 284 F.3d 1158 (9th Cir. 2002) (Nehmer III).

Claims evaluated and granted under the *Nehmer* procedures are evaluated under different rules than most VA claims. In claims involving service connection for diseases presumed to be caused by an herbicide agent, such as the Veteran's claim prior to his death, VA has issued special regulations to implement orders of the *Nehmer* courts.

The *Nehmer* courts carved out an exception to the usual rules involving herbicide-related diseases and the effective dates assigned to these grants in order to allow for retroactive grants of service connection and compensation benefits intended to address inequities in the laws and adjudication of these claims during the 1980s and 1990s.

The law provides that if a Veteran was exposed to an herbicide agent during active military, naval, or air service, then a defined group of diseases shall be service-connected if the requirements of 38 C.F.R. § 3.307(a)(6) are met, even though there is no record of such disease during service, provided further that the rebuttable presumption provisions of 38 C.F.R. § 3.307(d) are also satisfied. 38 C.F.R. § 3.309(e).

The provisions of 38 C.F.R. § 3.816 set forth the class members who may be considered for awards under the *Nehmer* court orders and govern the payment of benefits to survivors or estates of deceased beneficiaries. As the Veteran served in the territorial waters of Vietnam during the Vietnam Era, he is considered a Vietnam veteran presumed to have been exposed to an herbicide agent (*see* 38 C.F.R. § 3.307(a)(3)); however, he is only considered a "*Nehmer* class member" if he has (or dies from) a covered herbicide disease." *See* 38 C.F.R. § 3.816(b).

When a *Nehmer* class member entitled to retroactive benefits under 38 C.F.R. § 3.816 dies prior to receiving payment of any such benefits, the benefits are paid to the first individual or entity listed in 38 C.F.R. § 3.816(f)(1) living or in existence at the time of payment. Under this provision, benefits are paid as

follows, in this sequential order: to the *Nehmer* class member's spouse (i.e., the spouse legally married to the veteran at the time of his death); to the class member's child(ren) regardless of age or marital status (i.e., natural and adopted children and any stepchildren who were members of the class member's household at the time of his death); to the class member's parent(s); and finally, to the class member's estate.

In the June 2022 rating decision, the Veteran was determined to be a *Nehmer* class member who had filed a claim for service connection for bladder cancer and determined that that disability was a presumptive disability relating to exposure to an herbicide agent. As it determined that the Veteran was such a class member, VA reviewed the claims file to determine potential class members. The appellant had already submitted a claim for burial benefits prior to this June 2022 decision, and a VA employee memorialized a telephone call to the appellant in May 2022 in which the employee asked for the appellant to list each of her siblings. Pursuant to that request, the appellant reportedly identified D.G. and A.G. as her adult biological siblings. She also identified C.G. as the Veteran's adopted child. That same day, VA received a copy of C.G.'s revised birth certificate identifying the Veteran as his father. VA later obtained A.G.'s birth certificate, which also identified the Veteran as her father. As the Veteran had previously submitted birth certificates for D.G. and the appellant confirming his paternity of those individuals, VA therefore issued the June 2022 administrative decision on appeal in which it awarded one fourth of the accrued *Nehmer* benefits to each child.

As noted above, accrued benefits to a deceased *Nehmer* class member are payable in a strict sequential order. 38 C.F.R. § 3.816(f)(1). First in that list is a spouse of the class member who was legally married to the veteran at the time of his death. *Id.* Next in the list are the children of a class member regardless of the age or marital status of the child. *Id.* Of particular note, the law requires that "if more than one child exists, payment will be made in equal shares [to each child]." 38 C.F.R. § 3.816(f)(1)(ii).

Although the Veteran had previously been married to the appellant's mother, he affirmatively stated in claims received in November 2006 and May 2013 that he and the appellant's mother had divorced. The Veteran's death certificate also listed

his marital status as divorced. The Board therefore finds that there was no spouse, as that term is defined in 38 C.F.R. § 3.816(f)(1)(i). The next class of individuals entitled to accrued *Nehmer* benefits is therefore the children. Here, there are four children, as confirmed by each child's birth certificate of record and, in the case of C.G., his revised birth certificate and adoption decree.

The Board has no reason to doubt the appellant's statement that she alone cared for the Veteran in the many years leading up to her death or her contention that her father would have wished to have her be the sole recipient of any VA benefits awarded after his death. The Board also finds it admirable that the appellant undertook the effort to care for him during his lengthy illness. However, the Board is bound by the statutes and regulations governing the provision of VA benefits. The law does not provide any exception to the requirement that each child be paid an equal share of the accrued *Nehmer* benefits based on the number of children. There is no mechanism under law for VA to restrict payment of the Veteran's retroactive accrued *Nehmer* benefits to only certain children of the Veteran, regardless of his will or the caretaking responsibilities the respective children undertook. Accordingly, the Board finds that, as a matter of law, the appellant's appeal for an increased share of the Veteran's accrued *Nehmer* benefits must be denied.

In making this determination, the Board recognizes that 38 C.F.R. § 3.816(f) includes various provisions regarding VA's obligations to identify all potential class members for *Nehmer* benefits. At first glance, a review of the Veteran's VA medical records would appear to suggest that there was a dispute as to the number and identity of the Veteran's children. For instance, at a VA psychiatric clinical visit in November 2013, the Veteran reported that while he had many grandchildren, he had only three children. This inconsistency can be resolved by reviewing the adoption decree for C.G., which reveals that his biological mother was A.G., making C.G. the Veteran's biological grandchild. Nonetheless, because the appellant legally adopted C.G., he is still considered the Veteran's "child" for the purposes of calculating the amount of accrued *Nehmer* benefits owed to each child under 38 C.F.R. § 3.816(f)(1)(ii). Ultimately, there is no doubt as to the identity and number of the Veteran's children in the record. As such, the Board

IN THE APPEAL OF
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finds that 38 C.F.R. § 3.816(f)(3) requires no additional attempts to inquire as to additional beneficiaries.

M. Tenner
Veterans Law Judge
Board of Veterans' Appeals

Attorney for the Board Whitelaw, Braden

The Board's decision in this case is binding only with respect to the instant matter decided. This decision is not precedential and does not establish VA policies or interpretations of general applicability. 38 C.F.R. § 20.1303.

Additional material from this filing is available in the Clerk's Office.