

UNITED STATES COURT OF VETERANS APPEALS

MISC. NO. 5-94

IN RE:

RULE 43

Before NEBEKER, Chief Judge, and KRAMER, FARLEY, MANKIN,  
HOLDAWAY, IVERS, and STEINBERG, Judges.

O R D E R

Pursuant to 38 U.S.C. § 7264(a) and consistent with 28 U.S.C. § 2071(b) and (e), the Court has determined that there is an immediate need to amend Rule 43 of this Court's Rules of Practice and Procedure (Rules). This action is prompted by the Court's precedential panel opinion issued today in Landicho v. Brown, \_\_\_ Vet.App. \_\_\_, No. 90-1150 (consolidated with Oseo v. Brown, No. 92-90) (Sept. 23, 1994).

Rule 43(a) of this Court's Rules provides for the substitution of a party after his/her death, both before (para.(a)(1)) and after (para.(a)(2)) a Notice of Appeal has been filed. Rule 43(a) currently provides:

(a) **Death of a Party.**

(1) Before Notice of Appeal. If a party entitled to appeal dies before filing a Notice of Appeal, the Notice of Appeal may be filed within the time limit in Rule 4 by any person claiming entitlement to accrued benefits under 38 U.S.C. § 5121(a), by the personal representative of the deceased party's estate, by any other appropriate person, or, if there is no such person, by the party's representative of record before the Board.

(2) After Notice of Appeal. If a party dies after a Notice of Appeal is filed or while a proceeding is pending in this Court, any person claiming entitlement to accrued benefits under 38 U.S.C. § 5121(a), the personal representative of the deceased party's estate, or any other appropriate person may be substituted as a party on motion by such person or by any party. If no such person exists, any party may suggest the death on the record and proceedings will then be as the Court directs.

U.S. Vet. App. R. 43(a).

Up to this time, the Court has routinely permitted substitution under Rule 43(a)(2) when an appellant has died while his or her claim is pending in this Court. This practice will no longer be routinely followed. In Landicho, supra, this Court today decides that substitution is not permissible where the appellant

was a veteran who died while the denial by the Board of Veterans' Appeals of his or her claim for disability compensation under chapter 11 of title 38, U.S. Code, was pending on appeal before this Court. Consistent with the holding of this Court in Landicho and concurrent with the issuance of that opinion, the Court issues this order amending Rule 43(a) of its Rules to reflect the Court's holding. Accordingly, it is

ORDERED that, effective this date, Rule 43(a) of the Court's Rules is amended to read as follows (by inserting the material in boldface italics and deleting the material in brackets):

(a) **Death of a Party.**

(1) Before Notice of Appeal. If a party entitled to appeal dies before filing a Notice of Appeal, the Notice of Appeal may, *to the extent permitted by law*, be filed within the time limit in Rule 4 [by any person claiming entitlement to accrued benefits under 38 U.S.C. § 5121(a),] by the personal representative of the deceased party's estate, by any other appropriate person, or, if there is no such person, by the party's representative of record before the Board.

(2) After Notice of Appeal. If a party dies after a Notice of Appeal is filed or while a proceeding is pending in this Court, [any person claiming entitlement to accrued benefits under 38 U.S.C. § 5121(a),] 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 or by any party. If no such person exists, any party may suggest the death on the record and proceedings will then be as the Court directs.

DATED: SEP 23 1994

BY THE COURT:



FRANK Q. NEBEKER  
Chief Judge