

**Department of
Veterans Affairs**

Memorandum

Date: March 16, 2007

VAOPGCPREC 2-2007

From: Acting General Counsel (022)

Subj: *Padgett v. Nicholson*, 473 F.3d 1364 (Fed. Cir. 2007)—Effect on Appeal Pending before Board of Veterans' Appeals when Appellant Dies—38 C.F.R. § 20.1302

To: Chairman, Board of Veterans' Appeals (01)

QUESTION PRESENTED:

What effect does the decision of the United States Court of Appeals for the Federal Circuit (Federal Circuit) in *Padgett v. Nicholson*, 473 F.3d 1364 (Fed. Cir. 2007), have on an appeal pending before the Board of Veterans' Appeals (Board) when the appellant dies?

HELD:

The decision of the Court of Appeals for the Federal Circuit in *Padgett v. Nicholson*, 473 F.3d 1364 (Fed. Cir. 2007), which authorizes the Court of Appeals for Veterans Claims to grant *nunc pro tunc* relief and substitute a surviving spouse for a veteran who died after his appeal was submitted for decision but before the court issued its decision, has no effect on an appeal pending before the Board of Veterans' Appeals when the appellant dies. The disposition of such appeals is controlled by 38 C.F.R. § 20.1302, which requires the Board to dismiss such appeals.

COMMENTS:

1. The Secretary has issued a regulation governing the disposition of an appeal pending before the Board when the appellant dies. Section 20.1302 of title 38, Code of Federal Regulations, directs the Board to dismiss an appeal pending before it when the appellant dies. The question has arisen whether section 20.1302 remains valid in view of the Federal Circuit's recent decision in *Padgett v. Nicholson*. Because *Padgett* did not involve an appeal pending before the Board when the appellant died, and because the Federal Circuit distinguished *Padgett* from its prior precedent on a basis inapplicable to appeals pending before the

Board, we conclude that section 20.1302 remains valid and continues to govern the disposition of an appeal pending before the Board when the appellant dies.

2. *Padgett* involved a veteran who appealed an adverse Board decision to the Court of Appeals for Veterans Claims (Veterans Court) and died after his appeal had been fully briefed and submitted to the court for decision but before the court decided his case. *Padgett*, 473 F.3d at 1366. The Veterans Court issued its opinion before learning of the veteran's death. *Id.* VA moved to have the opinion withdrawn and the appeal dismissed. *Id.* The veteran's surviving spouse, who had filed a claim for accrued benefits, opposed the motion and asked to be substituted for the deceased veteran. 473 F.3d at 1366-67. The Veterans Court withdrew its opinion, dismissed the appeal, vacated the underlying Board decision, and denied the request to be substituted. 473 F.3d at 1367. On appeal, the Federal Circuit held that: (1) the Veterans Court has the authority to provide *nunc pro tunc* relief,¹ 473 F.3d at 1368; (2) awarding *nunc pro tunc* relief in this case would be consistent with the statutory scheme governing benefits to veterans and their survivors, 473 F.3d at 1369; (3) the surviving spouse had standing to be substituted for the deceased veteran, 473 F.3d at 1370; and (4) granting *nunc pro tunc* relief in this case would be consistent with justice and fairness to the parties, 473 F.3d at 1370-71.

3. *Padgett* involved only an appeal pending before the Veterans Court in which the appellant died after the case had been submitted to that court for decision but before the court issued its decision. It did not involve an appeal pending before the Board. Furthermore, as part of its rationale for its decision, the Federal Circuit distinguished *Padgett* from its prior precedent approving of the Veterans Court's practice of dismissing an appeal pending when the appellant dies. 473 F.3d at 1369 (distinguishing *Padgett* from *Zevalkink v. Brown*, 102 F.3d 1236, 1243-44 (Fed. Cir. 1996), noting that in *Zevalkink* the appellant died before the case was submitted). The Federal Circuit observed that the appealed Board decision was in "a state of nonfinality" in such cases, but the appealed Board decision in *Padgett* was in "a state of finality." *Padgett*, 473 F.3d at 1369 (quoting *Landicho v. Brown*, 7 Vet. App. 42, 52 (1994)). Because an appeal pending before the Board when the appellant dies would also not be in "a state of finality," the Federal Circuit's rationale for *Padgett* would simply not apply to appeals pending before the Board. Accordingly, there is no basis on which to deviate from the clear language of section 20.1302, which directs dismissal of appeals pending before the Board when the appellant dies.

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¹ *Nunc pro tunc*, literally meaning "now for then," designates a judicial act with retroactive legal effect. *Black's Law Dictionary* 1100 (8th ed. 2004).