

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Oct 19, 2020

SEAN F. MCAVOY, CLERK

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5 **UNITED STATES DISTRICT COURT**
6 **EASTERN DISTRICT OF WASHINGTON**

7 TIMOTHY F.,¹

8 Plaintiff,

9 vs.

10 ANDREW M. SAUL,
11 COMMISSIONER OF SOCIAL
SECURITY,

12 Defendant.

No. 1:20-cv-03019-MKD

**ORDER DENYING “SECOND
MOTION TO SUBSTITUTE
PARTY”**

ECF No. 24

13 BEFORE THE COURT is the filing dated October 12, 2020 captioned on
14 the docket as Plaintiff’s “Second Motion to Substitute Party.” ECF No. 24.
15 Attorney James Tree represents Plaintiff; Special United States Assistant Attorney
16 Joseph Langkamer represents Defendant. The parties have consented to proceed
17 before a magistrate judge. ECF No. 6. The Court expedites consideration of this
18 matter without awaiting a reply from Plaintiff due to the inadequacy of the motion

19 _____
20 ¹ To protect the privacy of plaintiffs in social security cases, the undersigned
identifies them by only their first names and the initial of their last names.

1 under Fed. R. Civ. P. 25 and LCivR 7. For the reasons discussed below, the
2 motion is denied.

3 BACKGROUND

4 On February 12, 2020, Plaintiff filed an appeal of an administrative law
5 judge's denial of his application for disability insurance benefits under Title II and
6 supplemental security income benefits under Title XVI of the Social Security Act.
7 ECF No. 1. On August 20, 2020, the Court granted Plaintiff's Motion for
8 Summary Judgment and remanded the matter pursuant to sentence four of 42
9 U.S.C. § 405(g). ECF No. 18.

10 On September 9, 2020, Plaintiff's counsel filed a motion for substitution of
11 Megan Derosier as Plaintiff, advising that Plaintiff had died on May 27, 2020 and
12 Ms. Derosier was Plaintiff's daughter. ECF No. 20. On September 24, 2020, the
13 Court denied Ms. Derosier's motion with leave to renew. ECF No. 23. The Court
14 found it lacked evidence to find the requirements of Federal Rule of Civil
15 Procedure 25 were met. ECF No. 23 at 3.

16 On October 12, 2020, Plaintiff's counsel filed documents docketed as
17 Plaintiff's "Second Motion to Substitute Party." ECF No. 24. The filing consists
18 of (1) two Social Security Administration form notices (Form HA-539²)

19 ² Form HA-539 is used at the administrative hearing level. *See*
20 <https://www.ssa.gov/forms/ha-539.html>.

1 signed by Amber Martinez, one dated September 30, 2020; (2) the Declaration of
2 Amber Martinez requesting her substitution as plaintiff as the guardian of the
3 decedent's minor child; and (3) Plaintiff's death certificate. ECF No. 24. Though
4 docketed as a motion, no motion was filed. On October 14, 2020, Defendant filed
5 a response. ECF No. 25. Defendant has no objection to Ms. Martinez's
6 substitution for purposes of Plaintiff's Title II claim, however, notes that her
7 substitution "may not be appropriate for purposes of Plaintiff's Title XVI claim."
8 ECF No. 25 at 2 (citing 42 U.S.C. § 416.542(b)(1) regarding payment to the
9 deceased recipient's surviving eligible spouse).

10 LEGAL STANDARD

11 Federal Rule of Civil Procedure 25 outlines the procedure required for
12 substitution of a party upon a party's death where the claim is not extinguished:

13 If a party dies and the claim is not extinguished, the court may order
14 substitution of the proper party. A motion for substitution may be made by
15 any party or by the decedent's successor or representative. If the motion is
not made within 90 days after service of a statement noting the death, the
action by or against the decedent must be dismissed.

16 Fed. R. Civ. P. 25(a)(1). In addition to these substantive requirements, the "motion
17 to substitute, together with a notice of hearing, must be served on the parties as
18 provided in Rule 5 and on nonparties as provided in Rule 4." Fed. R. Civ. P.
19 25(a)(3).

1 **DISCUSSION**

2 The filing which was docketed as Second Motion to Substitute Party does
3 not comply with Local Civil Rule 7(b) which provides “[t]he moving party shall
4 file and serve a motion and any supporting materials. The motion serves as the
5 memorandum and shall set forth supporting factual assertions and legal authority.”
6 *See* LCivR 7(b). The Second Motion to Substitute does not include an
7 accompanying motion and memorandum, and therefore does not address the
8 substantive and procedural requirements of Federal Rule of Civil Procedure 25(a).
9 The documents filed are supporting materials which lack necessary explanation.

10 For example, the Court must determine whether Ms. Martinez is “the
11 property party.” If a claimant dies before he receives a Title II underpayment³, §
12 204(d) of the Social Security Act governs the disbursement of any disability
13 benefit payments due at the time of the claimant's death. This provision describes
14 the descending level of priority of seven classes of persons who may receive any
15 outstanding benefits. *See* 20 C.F.R. § 404.503(b)(1)–(7). Surviving children are

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18 ³ The term “underpayment” includes “nonpayment where some amount of such
19 benefits was payable. An underpayment may be in the form of an accrued unpaid
20 benefit amount for which no check has been drawn or in the form of an
unnegotiated check payable to a deceased individual.” 20 C.F.R. § 404.501(a).

1 second and fifth in order of priority after an eligible surviving spouse.⁴ *See* 20
2 C.F.R. § 404.503(b)(1), (2), (5). “A member of any of the enumerated classes has
3 standing to pursue the deceased beneficiary's benefits.” *See Youghioghney & Ohio*
4 *Coal Co. v. Webb*, 49 F.3d 244, 247 (6th Cir. 1995). On the other hand, only
5 spouses and parents are eligible to receive underpayments for SSI. 20 C.F.R. §
6 416.542(b)(4) (“No benefits may be paid to the estate of any underpaid recipient,
7 the estate of the surviving spouse, the estate of a parent, or to any survivor other
8 than” a surviving eligible spouse or surviving parents). Therefore, it appears Ms.
9 Martinez may be a proper party in this matter regarding the DIB claim, but not the
10 SSI claim. As there is no accompanying memorandum, the “Second Motion to
11 Substitute” does not address this issue.

12 Furthermore, without more information, the Court is unable to confirm
13 whether the Second Motion to Substitute meets the procedural requirements of
14 Rule 25 requiring “[a] motion to substitute, together with a notice of hearing, must
15 be served . . . on nonparties as provided in Rule 4. A statement noting death must
16 be served in the same manner.” Fed. R. Civ. P. 25(a)(3). Although the rule
17 governing substitution does not say which nonparties must be served, case law

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19 ⁴ The declaration of Ms. Martinez indicates Plaintiff “did not have a spouse at the
20 time of his death,” however, the death certificate names a surviving spouse and
lists marital status as “separated.” ECF Nos. 24-2, 24-3.

1 suggests those with a potential financial interest, namely the decedent’s successors
2 or personal representatives should be served. *See, e.g., Barlow v. Ground*, 39 F.3d
3 231, 233 (9th Cir. 1994) (“non-party successors or representatives of the deceased
4 party must be served the suggestion of death in the manner provided by Rule 4 for
5 the service of a summons.”); *Atkins v. City of Chicago*, 547 F.3d 869, 874 (7th Cir.
6 2008) (holding that motion to substitute filed without serving the personal
7 representative of the deceased’s estate was “a nullity”).

8 The record suggests Plaintiff has multiple successors, including a spouse,
9 four children, and parents, and it is unknown whether these nonparties also may
10 have an interest in this case and therefore should be served in accordance with
11 Rule 25. Any future motion to substitute must address the service requirement.

12 ACCORDINGLY, IT IS HEREBY ORDERED:

13 The Second Motion to Substitute Party, **ECF No. 24**, is **DENIED**. **Any**
14 **future motion to substitute shall include a motion and memorandum**
15 **addressing the requirements of Federal Rule of Civil Procedure 25.**

16 The District Court Executive is directed to file this Order and furnish copies
17 to counsel.

18 DATED this October 19, 2020.

19 *s/Mary K. Dimke*
20 MARY K. DIMKE
UNITED STATES MAGISTRATE JUDGE