

DATE: 9-11-92

CITATION: VAOPGCPREC 18-92  
Vet. Aff. Op. Gen. Couns. Prec. 18-92

**TEXT:**

**QUESTION PRESENTED:**

Does a remand from the Board of Veterans' Appeals (BVA), prior to the issuance of a determination on an underlying claim, constitute a "final decision" under 38 U.S.C. § 5904(c)(1) and 38 C.F.R. § 20.609(c)(1), following which an attorney may properly obtain a fee for representing a claimant before the Department of Veterans Affairs (VA)?

**DISCUSSION:**

1. As a result of the enactment of the Veterans' Judicial Review Act (VJRA), Pub. L. No. 100-687, Div. A, 102 Stat. 4105 (1988), under appropriate circumstances an attorney or agent who represents a claimant before VA may now collect fees in excess of \$10. Prior to the enactment of the VJRA, an attorney was limited to a statutory maximum fee of \$10. See 38 U.S.C. § 3404(c) (1982). Section 104(a) of the VJRA repealed the \$10 fee limitation; the new fee provisions contained in what is now 38 U.S.C. § 5904(c)(1) FN1 were made applicable only to cases where a "notice of disagreement" (NOD) is filed on or after the date of enactment, by section 403 of the VJRA. See VJRA, Title IV, § 403, 102 Stat. 4105, 4122 (1988). Included in the new fee provisions is a requirement that a fee may not be "charged, allowed, or paid for services of agents and attorneys with respect to services provided before the date on which the Board of Veterans' Appeals first makes a final decision in the case." 38 U.S.C. § 5904(c)(1) (emphasis added).

2. In the situation presented, BVA has apparently remanded a case to the regional office without making a decision on the underlying claim. As provided in 38 C.F.R. 21 20.1100(b) FN2 , a determination by BVA to remand a case "is in the nature of a preliminary order and does not constitute a final decision of the Board." We note that determinations concerning what constitutes a "final order" of the Department have also surfaced in the context of the appellate jurisdiction of the Court of Veterans Appeals (COVA). COVA has ruled that it lacks jurisdiction to review a claim where BVA has not issued a "final order" on the underlying claim, holding " t his Court will neither review BVA decisions in a piecemeal fashion nor unnecessarily interfere with the Department of Veterans Affairs' (VA) deliberative process." Harris v. Derwinski, 1 Vet.App.180, 183 (1991), COVA's holding in Harris concerning what constitutes a "final order" in the context of its own authority to review claims supports the conclusion here that

there is no basis for a finding that BVA's decision to remand is a "final decision" of the BVA.

3. The legislative history of the VJRA also supports this conclusion as to the earliest point at which an attorney may charge for representing a claimant before the Department. An extensive discussion of this history appears in Judge Steinberg's concurring opinion in In the Matter of Smith, 1 Vet.App. 492 , 496-511 (1991). In Smith, Judge Steinberg noted:

The legislative history demonstrates that Congress intended the VA administrative process to continue to operate after November 17, 1988, without claimant-paid attorney representation, but that once an initial BVA decision was adverse the claimant would be free to pay an attorney to provide representation as to that claim before VA or the BVA, or both. In fact, to conclude otherwise would contravene the very clear Congressional intent that for claims as to which a post-November 17, 1988, NOD was filed a claimant-paid attorney should be able to seek reconsideration or reopening if that would best suit the claimant/client's interests and possibly avoid the time and expense involved in subsequent administrative or judicial appeals.

1 Vet. App. 492, 508-09 (Steinberg J. concurring).

4. Judge Steinberg's analysis of the legislative history highlights the fact that Congress only envisioned paid attorney representation after BVA first enters a final decision on a claim. He recognized, however, that paid attorney representation may properly occur at the regional office level in certain cases. Examples of situations in which fees may be appropriate for attorney representation at the regional office level include:

- a. COVA orders the remand of a case to the BVA which in turn remands the case to the regional office for further development. See 38 U.S.C. § 7252(a);
- b. BVA issues an adverse decision and the claimant or claimant's attorney requests reconsideration by an expanded panel of the BVA; this may result in the case being remanded to the regional office for further development. See 38 U.S.C. § 7103, 38 C.F.R. § 20.1001; and
- c. The claimant or claimant's attorney chooses to reopen a previously denied claim at the regional office by submitting new and material evidence after the entry of an initial BVA decision on the claim. See 38 U.S.C. § 5108, 38 C.F.R. § 20.1105.

In the above situations, an attorney would likely be permitted to charge, attempt to charge, solicit, contract for, or receive a fee, since the action triggering the remand occurred after BVA first issued a final decision on the claim. These are distinguishable from the situation presented as it appears that an attorney has

attempted to "contract for" a fee from a claimant prior to the time BVA first issued a final decision on the claim. Such a fee agreement would violate 38 U.S.C. §§ 5904(c)(1) and 5905 since it "contracts for" the payment of a fee before statutorily authorized.

**HELD:**

An attorney may not solicit, contract for, charge, receive or attempt to receive or solicit, a fee in connection with representation of a claimant before the Department on a benefits issue until after the BVA first issues a final decision on that claim. A determination by the BVA to remand a case prior to making a determination on the underlying claim is, pursuant to 38 C.F.R. § 20.1100(b), in the nature of a "preliminary order" and does not constitute a "final decision" subsequent to which an attorney may pursue the collection of fees for representing a claimant before the Department.

1 The Department of Veterans Affairs Health-Care Personnel Act of 1991, Pub. L. No. 102-40, § 402(b)(1), 105 Stat. 187, 238 (1991), redesignated each section in, among other chapters, chapter 59 of title 38, United States Code, so that the first two digits of the section number are the same as the chapter number of the chapter containing that section.

2 Added by notice published at 57 Fed.Reg. 4088, 4126 (1992). See generally, Board of Veterans' Appeals Rules of Practice, 57 Fed. Reg. 4109-4139 (1992).

VETERANS ADMINISTRATION GENERAL COUNSEL  
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