

Date: September 28, 1995

VAOPGCPREC 22-95

From: General Counsel (022)

Subj: Request for Opinion -- Effect of Secondary Entitlements and Changes in Representational Status on the Department of Veterans Affairs' Obligation to Pay Attorney Fees From Past-Due Benefits.

To: Under Secretary for Benefits (20)

QUESTIONS PRESENTED:

a. What is the Department of Veterans Affairs' (VA's) responsibility concerning the direct payment of attorney fees from past-due benefits in cases where representation occurs solely before the Court of Veterans Appeals (CVA) and secondary benefits are determined to be payable?

b. (1) Must VA notify an attorney who no longer represents a claimant, and whose fee agreement does not call for direct payment of fees by VA, that past-due benefits are payable so that the attorney can pursue collection of a fee?

(2) Must VA pay attorney fees from past-due benefits when the attorney claiming entitlement to direct payment of fees no longer represents the claimant?

(3) Must VA pay attorney fees from past-due benefits when the attorney claiming the fee represented the claimant for only part of the time the claim was pending before the CVA?

COMMENTS:

1. As a preliminary matter, we note that conversations with the Assistant Director for Program Management, Compensation and Pension Service, resulted in verbal modification of the original request for opinion. We now understand your question regarding payment of fees from secondary benefits to pertain only to cases where the Veterans Benefits Administration (VBA) must decide whether attorney fees are payable

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from past-due benefits because the Board of Veterans' Appeals (BVA) lacks jurisdiction to make this decision. ¹ The scope of this question is very narrow because this situation arises only in cases where no representational activity occurs before VA, i.e., when attorney representation is provided only before the CVA.

2. Your opinion request is divided into two general areas, the first concerning payment of attorney fees from secondary benefits following a CVA decision when there has been no representation before VA. ² The second deals with VA's responsibility to direct payment of attorney fees from past-due benefits following certain changes in representational status.

3. There is no single, definitive answer to your first question concerning payment of attorney fees from secondary benefits. Whether direct payment of attorney fees is appropriate in any case depends on the individual facts in the case. We can provide, however, some general information which you may find useful in carrying out VA's responsibility to pay attorney fees directly from past-due benefits in cases where representation occurs solely before the CVA.

4. Initially, it is important to recognize that VA's general responsibility to make direct payment of attorney fees

¹ VBA receives specific instructions from BVA regarding whether fees are payable, and the amount to be paid, in attorney fee payment cases which involve representation before VA. See VA Circular 20-92-14 (revised) Payment of Attorney Fees From Past-Due Benefits (February 7, 1995); BVA Memorandum 01-92-19 (June 29, 1992) (Processing of Cases Concerning Payment of Attorney Fees From Past-Due Benefits).

² Examples of secondary entitlements (those which flow from the favorable resolution of claims for other benefits) include dependent education assistance, dependency and indemnity compensation, and vocational rehabilitation assistance.

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from past-due benefits in cases where there has been no representational activity before the Department is very limited. As recently determined by the CVA, VA's attorney fee payment statute, 38 U.S.C. § 5904, is inapplicable to fee agreements for representation before the CVA.

[T]he provisions of section 5904 have no bearing on fee agreements for representation before this Court. The fee agreements addressed in section 5904 are those for representation in VA proceedings only. The sole requirements for agreements limited to fees for representation before the Court are set forth in section 7263(c) and (d)--i.e., that such fee agreements shall be filed with the Court and that they are reviewable by this Court alone for reasonableness.

In Re Smith, 7 Vet. App. 89, 91 (1994). Although recognizing attorney fees may ultimately be payable under 38 U.S.C. § 5904(d)(3) as a result of a CVA decision, the CVA, in *In Re Smith*, stated "section 5904(d)(3) is a command to the Secretary only," and "[t]he statutory construct of the fee agreement provisions makes clear that fee agreements before the Board or the Department and those before this Court are completely separate." *Id.*

5. Accordingly, in cases where attorney representation is limited to proceedings before the CVA, VA is responsible for the direct payment of attorney fees only where past-due benefits are awarded in the CVA proceeding and the fee agreement at issue meets the requirements of 38 U.S.C. § 5904(d)(3) and its implementing regulation, 38 C.F.R. § 20.609(h)(1)(i)-(iii).³ The standards applicable to payment of attorney

³ An example of such a situation occurred in a case where, in single judge order and without addressing attorney fees, the CVA reversed and remanded the case for purposes of awarding service connection and determining the appropriate disability rating. *Aronson v. Derwinski*, No. 90-1346, (February 13, 1992) (2 Vet. App. 263 (1992) (table)). See *Aronson v. Derwinski*, 3 Vet. App. 162, 163-64 (1993) (granting Secretary's motion for clarification of the CVA's order in No. 90-1346).

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fees from past-due benefits *which are secondary to a CVA determination* are no different than the standards for direct payment of fees in other CVA decisions. In such a case, VA would be obligated to make direct payment of an attorney's fee if the CVA awarded the secondary benefits, the fee agreement covered the secondary benefits, and the fee agreement complied with the provisions of 38 U.S.C. § 5904(d)(3) and 38 C.F.R. § 20.609(h)(i)-(iii).

6. The second area of your opinion request involves VA's obligation to attorneys whose representational status changes during the pendency of an appeal. Your first question in this regard asks whether VA has an obligation to inform an attorney who no longer represents the claimant that past-due benefits are payable, so that the attorney may pursue collection action against a claimant the attorney no longer represents.

7. Assisting an attorney in collecting a fee by providing notification of the claimant's impending receipt of a benefit check would require VA to provide the attorney personal claims-related information maintained in a VA system of records. The release of this information, absent the claimant's written consent or other disclosure authority, would violate the veteran's rights under the Privacy Act of 1974, 5 U.S.C. § 552a. VA's legal authority, predicated upon the attorney-client relationship, to disclose claims-related information to an attorney ends when the representational status between the claimant and the attorney is terminated. 38 C.F.R. § 14.629(c). VA has no authority to inform an attorney, who is not seeking direct payment of attorney fees from VA, no longer represents the claimant, and does not have the claimant's written consent to such disclosure, that his or her former client will be receiving a future payment of past-due benefits.

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8. Your next question asks whether VA is obligated to directly pay attorney fees from past-due benefits when the attorney no longer represents the veteran. Current representation is not a statutory or regulatory prerequisite to VA's payment of attorney fees from past-due benefits. 38 U.S.C. § 5904(c) and (d); 38 C.F.R. § 20.609(e). Accordingly, the fact that an attorney no longer represents a given claimant does not bar VA from directly paying fees from past-due benefits to that attorney, provided all other statutory and regulatory requirements for payment of fees, as well as the terms of the fee agreement, are met.

9. The last question, as verbally modified by the Assistant Director for Program Management, asks what is VA's fee-payment obligation when an attorney-fee agreement was in place for only part of the time the claim was pending before the CVA. A claimant is free to change attorneys, or switch from a service organization to an attorney representative, while his or her case is pending before the CVA. We can only advise that in such cases, VA's obligation to pay attorney fees would depend on the terms of the fee agreement and whether the provisions of the applicable fee payment statutes and regulations are met. ⁴

HELD:

a. In cases where attorney representation is limited to proceedings before the CVA, VA is authorized to make direct payment of attorney fees from past-due secondary benefits if the CVA awards the secondary benefits, the fee agreement covers the secondary benefits, and the fee agreement complies with the provisions of 38 U.S.C. § 5904(d)(3) and 38 C.F.R. § 20.609(h)(i)-(iii).

⁴ In complex cases involving successive representation and multiple fee agreements, VBA may wish to ask for our assistance in interpreting the applicable fee agreements or filing motions with the CVA requesting clarification of the issue of VA's obligation to pay attorney fees.

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b. (1) Absent the claimant's written consent, VA has no authority to inform an attorney who is not seeking direct payment of attorney fees from VA, and no longer represents the claimant, that his or her former client will be receiving a future payment of past-due benefits.

(2) VA may directly pay attorney fees, to an attorney who represented a claimant during a CVA appeal, but no longer represents the claimant, if the statutory and regulatory prerequisites for direct payment of fees are met and the fee agreement provides for direct payment.

(3) VA's obligation to pay attorney fees when the attorney fee agreement was only in place for part of the time the case was pending before the CVA is dependent upon the terms of the fee agreement and whether the statutory and regulatory prerequisites for direct payment of attorney fees have been met.

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