

Date: July 24, 1996

VAOPGCPREC 5-96

From: General Counsel (022)

Subj: Various Applications of VAOPGCPREC 22-95 -- Payment of Attorney Fees by the Department of Veterans Affairs from Past-Due Benefits in Cases Remanded by the Court of Veterans Appeals

To: Under Secretary for Benefits (20)

QUESTIONS PRESENTED:

- a. Is the Department of Veterans Affairs (VA) authorized to directly pay an attorney's fee from past-due benefits in a case where the attorney's representation is limited solely to the proceedings before the Court of Veterans Appeals (CVA) and the benefits are awarded to the veteran by VA following a CVA remand for additional development?
- b. In a case where an attorney's representation is limited to the CVA proceedings and VA grants benefits to the veteran following a CVA remand for additional development, must the fee agreement specifically mention that it includes benefits awarded for dependents for the attorney to be paid directly by VA out of a past-due amount paid to the veteran for dependents?
- c. Whether a fee agreement must be between the beneficiary of a secondary benefit, e.g., a beneficiary entitled to receive past-due dependent educational assistance (DEA) benefits, and the attorney in order for VA to directly pay attorney fees from the beneficiary's award of past-due benefits?

COMMENTS:

1. In the context of the situation we addressed in paragraph 5 of VAOPGCPREC 22-95, we noted that VA's responsibility for the payment of fees from past-due benefits is the same for either primary or secondary benefits, i.e., VA is responsible for the direct payment of attorney fees only where the past-due benefits are awarded in the CVA proceeding and the fee agreement at issue meets the require

ments of 38 U.S.C. § 5904(d)(3) and its implementing regulation, 38 C.F.R. § 20.609(h)(1)(i)-(iii). See *Aronson v. Derwinski*, 3 Vet. App. 162, 163-164 (1993). You now request our opinion on three questions involving VA's responsibility to pay fees from past-due benefits in situations in which the CVA remands a case for additional development and VA subsequently awards benefits.

2. Our response to your first question must be prefaced with the caveat that the specific facts in each individual case will dictate whether VA may be responsible for payment of fees from past-due benefits based upon only work performed before the CVA. In regard to this question generally, however, we refer you to the holding set forth in paragraph b.(2) of the HELD section of VAOPGCPREC 22-95. Therein, we held "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." Accordingly, as a general rule in appropriate cases, VA is authorized to pay attorney fees out of past-due benefits where VA awards benefits to a claimant subsequent to a CVA remand for further development.

3. The answer to your second question must also be that, depending upon the circumstances involved in a case, it may not be necessary for a fee agreement to specifically mention that it includes benefits awarded for dependents in order for VA to pay the attorney directly from a subsequent award for dependents. In attorney fee matters, of course, the specific terms of a fee agreement are always relevant, and may control the resolution of certain issues in specific cases. They are, however, only one of what may be many factors that must be considered in a given case. Examples of such factors, which are not addressed in your hypothetical, include all of the other terms of the agreement and matters such as whether the veteran's original claim for service connection included a claim for dependency benefits or whether the claim for dependency benefits was submitted subsequent to the award of service connection. Thus,

because of the absence of facts in your hypothetical, our answer cannot be any more definitive.

4. Your final query asks whether VA can pay a veteran's attorney directly from the past-due DEA benefits awarded to the veteran's daughter based on the daughter's claim for such benefits filed subsequent to the veteran's award of service connection. We do not believe that VA can pay a veteran's attorney from the past-due DEA benefits awarded to the veteran's daughter, even if the fee agreement between the veteran and the attorney includes words to the effect that it includes "payment for any award of DEA for my dependents." In the absence of a representational relationship between the person awarded benefits and an attorney, we are unaware of any authority for direct payment to the attorney from that person's past-due benefits. See generally 7A C.J.S. *Attorney & Client* § 166 (1980) (Necessity of Retainer).

HELD:

- a. VA is authorized to directly pay an attorney's fee from past-due benefits in an appropriate case where the attorney's representation is limited solely to the CVA proceedings and the benefits are awarded to the veteran by VA following a CVA remand for additional development.
- b. Depending on all of the circumstances involved, it may not be necessary for a fee agreement to specifically mention that it includes dependency benefits for an attorney to be paid directly by VA out of a past-due amount paid to the veteran for dependents.
- c. A fee agreement must be between the beneficiary of a secondary benefit and an attorney in order for VA to directly pay the attorney a fee from the beneficiary's award of past-due secondary benefits.

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