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Vet. Aff. Op. Gen. Couns. Prec. 19-89

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**TEXT:**

Applicability of Statutory Limitation on Attorneys' Fees at 38 U.S.C. §§ 3404 and 3405 to Administrative Debt-Collection Matters

**QUESTIONS PRESENTED:**

- (a) Have the amendments to 38 U.S.C. §§ 3404 and 3405 made by the Veterans' Judicial Review Act, Pub.L. No. 100-687, § 104, 102 Stat. 4105, 4108 (1988), changed the scope of the statutory limitation on attorneys' fees?
- (b) Does the statutory limitation on attorneys' fees, in its original form and as amended, apply generally to administrative debt-collection matters?
- (c) To what extent is the statutory limitation on attorneys' fees applicable to administrative debt-collection matters arising out of loan-guaranty debts?

**COMMENTS:**

1. The scope of the statutory limitation on attorneys' fees appearing in 38 U.S.C. §§ 3404 and 3405 ("the fee limitation") was addressed in a previous published General Counsel's opinion, Op. G.C. 11-86 (11-24-86). Since that opinion was issued, the sections in question were amended by the Veterans' Judicial Review Act, Pub.L. No. 100-687, § 104, 102 Stat. 4105, 4108 (1988). Further, questions have been raised concerning the appropriateness of applying the fee limitation to administrative debt-collection matters involving the Department of Veterans Affairs (VA), particularly in the loan-guaranty area. A recent U.S. district court decision has provided additional guidance on this issue. Accordingly, we believe clarification of Op. G.C. 11-86 is in order at this time.
2. The fee limitation appears in chapter 59, "Agents and Attorneys," in title 38, United States Code, which is titled "Veterans' Benefits." Section 3405 provides that whoever solicits, contracts for, charges, or receives any fee or compensation, except as provided in sections 3404 or 784 of title 38, is subject to criminal penalties. Section 784 provides for attorneys' fees in insurance cases. Section 3404 generally deals with the recognition of agents and attorneys for the preparation, presentation, and prosecution of claims under laws administered by VA. Prior to amendment by Pub.L. No. 100-687, subsection (c) of section 3404 provided that the Secretary of Veterans Affairs "shall determine and pay fees to agents or attorneys recognized under this section in allowed claims for

monetary benefits under laws administered by VA " and that such fees (1) shall be determined and paid as prescribed by the Secretary, (2) "shall not exceed \$10 with respect to any one claim," and (3) "shall be deducted from monetary benefits claimed and allowed." The recognized objective of the fee limitation to preserve the informality of VA's adjudication system, Walters v. National Association of Radiation Survivors, 473 U.S. 305, 321-26 (1985), strongly suggests the limit was intended to apply to all VA benefit proceedings of an adjudicatory nature.

3. In Op. G.C. 11-86, which was issued before the statutes were amended, this office held that the fee limitation at 38 U.S.C. §§ 3404 and 3405 applied to all VA administrative proceedings involving beneficiaries or claimants, but did not bar payment of attorneys' fees by third parties on behalf of beneficiaries or claimants. This office also held that because waiver and forfeiture proceedings "are adjudicatory in nature and are conducted in the same informal setting as other VA benefit adjudications," the fee limitation should apply to these types of proceedings as well. Op. G.C. 11-86 at 3. Decisions in these proceedings are administratively appealable to the Board of Veterans Appeals (BVA) pursuant to 38 C.F.R. § 19.2. Applying the principle of consistent application, the opinion held that the fee limitation should apply to all VA administrative proceedings involving beneficiaries and claimants, including those relating to administrative debt collection. Id. at 3.

4. Although not specifically addressed in the opinion, it has been and remains this office's position that the fee limitation does not apply to court proceedings, whether initiated by VA or by a claimant. Thus, this office interprets the statutes as allowing a claimant to hire an attorney for the defense of a court action brought by VA against the claimant or for the purpose of bringing such an action against VA.

5. As amended by the Veterans' Judicial Review Act, the prohibition in section 3405 is the same as in the prior version of that statute, although the penalties for violation of the provision have been changed. Section 3404 was amended in new subsection (c)(1) to provide that " i n connection with a proceeding before VA with respect to benefits under laws administered by VA, 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." After a claimant has gone through the VA administrative process once, there is no limit on attorneys' fees, other than reasonableness as determined under subsection (c)(2), unless the claimant and the attorney agree upon a contingency fee to be paid out of past-due benefits, in which case the limit is 20 percent of such award, pursuant to subsection (d)(1).

6. The plain language of the statute as amended indicates that no fee is permitted to be charged by attorneys in connection with proceedings before VA "with respect to benefits" under laws which VA administers, until the BVA has rendered a decision. This language is somewhat broader than the language in the original statute and suggests no intention on the part of Congress to disturb VA's interpretation of the scope of the fee limitation.

7. No exception was made in the section, as amended, for administrative debt-collection proceedings, even though testimony at congressional hearings on judicial-review legislation called to Congress' attention VA's interpretation that the fee limitation in its then-current form applied to such proceedings. See *Judicial Review Legislation: Hearings on S. 11 and S. 2292 before the Senate Committee on Veterans' Affairs, 100th Cong., 2d Sess. 244 (1988)* (statement of Richard E. O'Dell, President, and Paul S. Egan, Legislative Director, Vietnam Veterans of America). Members of Congress are presumed to have knowledge of statements made at committee hearings and of the matters described. 2A N. Singer, *Sutherland Statutory Construction* § 48.10 (4th ed. 1984). Further, the legislature is presumed to know the prior construction of an act being amended. 1A N. Singer, *Sutherland Statutory Construction* § 22.35 (4th ed. 1985). Failure to amend a statute in the manner requested is thus evidence that the Congress intended to adopt the existing construction. See generally *id.*; cf. *Reed v. The Yaka*, 373 U.S. 410, 414-15 (1963) (Congressional failure to enact legislation in response to court decisions must be considered in construing meaning of statute).

8. The applicability of the fee limitation (both before and after its amendment) to VA administrative debt-collection proceedings was addressed in the recent U.S. district court decision in *BahnMiller v. Derwinski*, No. 88- 0732-A (E.D. Va. Nov. 8, 1989). In a well-reasoned opinion, the United States District Court for the Eastern District of Virginia held that the fee limitation, before and after its amendment, applies to debt-collection proceedings within VA through what it termed "Stage 1" of the VA debt- collection process. "Stage 1" includes proceedings involving, generally, dispute of the existence or amount of the debt, waiver of indebtedness, and appeal of decisions involving these matters. Such proceedings necessarily include administrative recoupment of overpayments to beneficiaries through offset of VA benefits. The court further held that the fee limitation does not apply "when the VA seeks legal remedies beyond the administrative context." Slip opinion at 20. The court indicated that the limit does not apply when VA reports a debt to credit reporting agencies, seeks attachment of a Federal tax refund, garnishes the salary of a veteran employed by the Federal government, sets the debt off against payments by VA to the debtor other than current salary or benefit payments, e.g., lump-sum leave payments, pursuant to 38 C.F.R. § 1.912, or causes the Department of Justice (DOJ) to initiate judicial proceedings. *Id.* at 5. The court characterized these proceedings as "Stage 2" of the process.

9. Thus, the court in *BahnMiller* essentially divided administrative debt- collection proceedings instituted by VA into two categories, those which are part of VA's informal, non-adversarial adjudicatory functions and those which are not. Attorneys and agents who represent VA beneficiaries and claimants in the first category are subject to the fee limitation, while those involved in the second category of proceedings are not subject to the limitation. As the court noted, this dichotomy is consistent with the statutory language and purpose of the sections and is supported by the legislative history of both versions of the statute. The court found this dichotomy "fair and sensible" and noted that at no stage of the proceedings were veterans left unaided in their pursuit or defense of benefits. *Id.* at 25-26.

10. We agree with the analysis of the district court in BahnMiller. We conclude that the amendments made by the Veterans' Judicial Review Act did not change the scope of the statutory limitation on attorneys' fees and that the limitation applies to debt-collection matters in the same manner under either form of the statute. Both in its original form and as amended, the fee limitation is applicable to all adjudicative and appellate proceedings before VA with respect to benefits, including proceedings involving administrative debt collection. Included are proceedings relating to such matters as waiver and the recovery of benefit overpayments by offset. However, as the fee limitation was intended to protect the informal, non-adversarial nature of VA's adjudicative process, it is not applicable to advice or assistance as to matters outside this process. Thus, veterans can, for example, hire attorneys to bring or defend legal actions or to advise them concerning their rights with respect to third parties without regard to the prohibitions of 38 U.S.C. §§ 3404 and 3405.

11. Questions have been raised concerning the applicability of the fee limitation to administrative debt collection arising out of VA's loan-guaranty program. Although the BahnMiller case arose in the loan-guaranty area, the court did not discuss in any detail the particulars of that program as it relates to administrative debt collection. Thus, additional clarification is in order here.

12. In applying the fee limitation to administrative debt collection in the loan-guaranty program, we are guided by the principles discussed above and enunciated by the court in BahnMiller. Thus, we interpret the fee limitation as applying only to those proceedings before VA relating to the collection of debts arising out of the loan-guaranty program which are adjudicated in VA's informal, non-adversarial process and which involve matters appealable to the BVA. It does not apply to actions taken by VA outside of this process.

13. Debts may arise under the loan-guaranty program when a veteran receives a VA loan guaranty on a home mortgage loan and the loan goes into default. VA pays the lender pursuant to the loan guaranty and seeks reimbursement from the veteran based upon the loan-guaranty agreement. Thus, VA makes a claim against the veteran based upon a contractual agreement. No decision is made by a rating board, no adjudication proceedings are conducted, and VA's determinations concerning the existence and amount of the indebtedness are not appealable to the BVA. Such proceedings relating to the enforcement of contractual rights can fairly be considered proceedings outside VA's adjudicative process, or "Stage 2" proceedings using the BahnMiller court's terminology. The fee limitation is inapplicable to such proceedings. Similarly, when VA attempts to collect loan-guaranty debts by means such as referral to the Internal Revenue Service, garnishment of Federal wages, or referral to DOJ, the proceedings may also be deemed "Stage 2" proceedings outside the scope of the fee limitation.

14. In contrast, when a veteran exercises the right to seek a waiver of indebtedness arising under the loan-guaranty contract, administrative adjudication proceedings are commenced. A decision is made by a committee on waivers and compromises which

is appealable to the BVA. These proceedings are adjudicative proceedings before VA ("Stage 1" in the court's terminology) to which the fee limitation applies.

**HELD:**

The amendments to 38 U.S.C. §§ 3404 and 3405 made by the Veterans' Judicial Review Act, Pub.L. No. 100-687, § 104, 102 Stat. 4105, 4108 (1988), while changing the nature of the limitation on attorneys' fees, do not affect the scope of the fee limitation's applicability. Both in its original and amended form, the fee limitation applies to agents and attorneys practicing before the Department of Veterans Affairs (VA) in administrative proceedings relating to veterans' benefits. These proceedings include administrative debt-collection proceedings and proceedings involving requests for waiver of indebtedness. The fee limitation does not, however, apply to proceedings outside VA's benefit- adjudication process, such as VA's efforts to determine and enforce its contractual rights arising out of its loan-guaranty program, to set off debts against Federal payments other than VA-benefit payments, or to collect debts through referral to other Federal agencies or to credit reporting agencies.

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