

DEPARTMENT OF VETERANS AFFAIRS

Memorandum 8-1

Date: December 9, 1992

O.G.C. Precedent Opinion <sup>27</sup> -92

From: General Counsel (022)

Subj: Payment of Attorney Fees: [redacted] Do not copy!  
[redacted] Do not copy!

To: Under Secretary for Benefits (212B)

QUESTIONS PRESENTED:

- a. Whether the attorney-fee agreement ultimately filed in this case is legally sufficient to require the Department of Veterans Affairs (VA) to make payment out of past-due benefits?
- b. If the fee agreement is sufficient, is VA legally obligated to pay the fee directly to the attorney when no past-due benefits are payable due to the fact that VA has already paid the complete amount of past-due benefits to the claimant?

DISCUSSION:

1. The relevant facts can be briefly stated. In a letter dated April 10, 1992, the Board of Veterans' Appeals (BVA) informed the veteran's attorney that, as a result of the favorable BVA decision in the case, the file was being returned to the San Juan Regional Office for the purpose of processing the award. He was further informed that a valid fee agreement between the attorney and the veteran was not on file. The attorney was advised to file copies of a valid fee agreement showing specific amounts and provisions agreed to regarding fees with both BVA and the San Juan Regional Office. A photocopy of a fee agreement was filed with the BVA on May 4, 1992, and with the regional office on May 7, 1992. In his letter to the regional office accompanying the fee agreement, the attorney requested direct payment of 20 percent of any past-due benefits due the veteran. In your opinion request, you indicate payment of the full amount of benefits to the veteran was approved by the San Juan Regional Office on May 9, 1992. 1/

Fees - Attorney

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1/ Copies of electronic-mail correspondence in the veteran's temporary claims folder appear to indicate that the fee agreement was not filed in the veteran's claims folder until after the regional office authorized full retroactive payment to the veteran on May 5, 1992.

X VET [redacted]

X 1-5 38 USC 5904 (c)



2.

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2. You have asked whether the fee agreement in this case was "sufficient to require VA to make payment out of past-due benefits." It would be improper, however, for us to answer this question. As provided in 38 U.S.C. § 5904(c)(2), Congress authorized BVA to review fee agreements, and vested the Court of Veterans Appeals (CVA) with the authority to review BVA fee agreement determinations. See 38 U.S.C. § 7263(d). A decision by this office as to the sufficiency of a fee agreement would clearly be an unwarranted usurpation of BVA's authority. In this regard, we note the CVA has determined that the Chairman of the BVA may not review attorney-fee agreements at the administrative level, stating "we hold that neither the Chairman's 'administrative control and supervision' authority under § 7101(a) nor any other authority authorizes him to carry out other functions specifically assigned to the Board by statute, specifically here the fee-agreement review function under 5904(c)(2)." Matter of Smith, 1 Vet. App. 492, 496 (1991). Similarly, the authority granted the General Counsel as the "Chief Legal Officer" does not authorize the General Counsel to review fee agreements for sufficiency at the administrative level. The General Counsel may, upon request, advise BVA on the proper interpretation of the law regarding fee agreements or other issues, but would not otherwise be authorized to review them.

3. BVA, upon its own motion or the request of either party, may review a fee agreement and may order a reduction in the fee if it is found to be unreasonable or excessive. 38 U.S.C. § 5904(c)(2). From the facts presented it does not appear that either the veteran or the attorney has requested that the fee agreement be reviewed. The remaining alternative for obtaining review of the fee agreement is for BVA, on its own motion, to review the fee agreement. <sup>2/</sup> We assume any consideration of the fee agreement by BVA would take into consideration the requirements of 38 C.F.R. § 20.609(c) which set out the conditions for payment of attorney fees from past-due benefits. Those conditions include the existence of a final decision of the BVA "with

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<sup>2/</sup> As provided by Veterans Benefits Administration (VBA) Circular 20-92-14, para. 2, (May 29, 1992), cases are currently forwarded from adjudication to BVA for a decision on the payment of attorney fees as a prerequisite to the payment of such fees from past-due benefits by VBA.

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respect to the issue, or issues involved" and the filing of a notice of disagreement "with respect to the issue, or issues involved," with the agency of original jurisdiction on or after November 18, 1988. 3/

4. We must emphasize, however, that, while it is within BVA's authority to conduct a review of the fee agreement, in our opinion the fact that VA has already paid 100 percent of the past-due benefits to the veteran moots the necessity for such a review. 4/ The statute which authorizes payment of attorney fees from past-due benefits is codified at 38 U.S.C. § 5904(d)(3). It provides as follows:

To the extent that past-due benefits are awarded in any proceeding before the Secretary, the Board of Veterans' Appeals, or the United States Court of Veterans Appeals, the Secretary may direct that payment of any attorneys' fee under a fee arrangement described in paragraph (1) of this subsection may be made out of such past-due benefits. In no event may the Secretary withhold for the purpose of such payment any portion of benefits payable for a period after the date of the final decision of the Secretary, the Board of Veterans' Appeals, or the Court of Veterans Appeals making (or ordering the making of) the award.

This provision, however, does not provide a waiver of sovereign immunity with respect to claims for attorneys' fees. It is well settled that, absent such a waiver, the United States is immune from claims for attorneys' fees. Ruckelshaus v. Sierra Club,

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3/ Added by notice published at 57 Fed. Reg. 4088, 4117 (1992). See also, Supplementary Information, Board of Veterans' Appeals Rules of Practice, 57 Fed. Reg. 4088, 4096-97 (1992) (discussing a comment received in response to VA's notice of public rule-making which voiced disagreement with inclusion of the phrase "with respect to the issue or issues involved" in the proposed 38 C.F.R. § 20.609(c)(1)-(2)).

4/ Current VBA procedure provides that if the regional office incorrectly fails to withhold an attorney's fee from a claimant's past due benefits award, the attorney and the claimant are to be notified that while VA regrets the error any adjustment must be arranged between the attorney and the claimant. VBA Circular 20-92-14, para. 23(h), (May 29, 1992).

4.

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463 U.S. 680, 685 (1983); Alyeska Pipeline Co. v. Wilderness Society, 421 U.S. 240, 267-68 (1975). See Russell v. Sullivan, 887 F.2d 170 (8th Cir. 1989) (Social Security Administration is not liable for payment of fees where all benefits were released to the claimant, despite a contingency-fee agreement by which a portion were to be paid directly to the attorney).

**HELD:**

a. It would be improper for the General Counsel to rule on the sufficiency of a particular attorney-fee agreement under 38 U.S.C. § 5904(c) since, as provided therein, Congress authorized the Board of Veterans' Appeals (BVA) to review fee agreements and, under 38 U.S.C. § 7263(d), vested the Court of Veterans Appeals (CVA) with the authority to review BVA determinations regarding attorneys' fees. The General Counsel's role in such matters is properly limited to advising BVA on matters of legal interpretation.

b. The United States is immune from claims for attorneys' fees absent a waiver of sovereign immunity. The statute which authorizes the Secretary to pay attorney fees out of past-due benefits does not waive sovereign immunity, and expressly prohibits the withholding of benefits payable after the date of the decision awarding past-due benefits for the purpose of paying attorney fees. Accordingly, VA has no legal authority to pay attorney fees when payment of the complete amount of past-due benefits has been made to the claimant.

James A. Endicott, Jr.

Attachments: C-Files

PRECEDENT OPINION	<input checked="" type="checkbox"/>	RJA
CONCLUSIVE OPINION	<input type="checkbox"/>	
ADVISORY OPINION	<input type="checkbox"/>	
INDEX	<input type="checkbox"/> YES	<input type="checkbox"/> NO