Date: October 12, 1994 O.G.C. Precedent 19-94

From: General Counsel (022)

Subj: Payment of Attorney Fees in Cases Where a Repeat Claim is Filed and the Requirements of 38 U.S.C. § 5108 are Inapplicable

To: Chairman, Board of Veterans' Appeals (01)

QUESTION PRESENTED:

Is the prerequisite of 38 U.S.C. § 5904(c)(1) and 38 C.F.R. § 20.609(c)(1) requiring a final decision by the Board of Veterans' Appeals (BVA) prior to charging an attorney fee satisfied when a "repeat" claim is filed after a final BVA decision has been issued regarding an earlier, similar claim, *e.g.*, a claim for pension, an increased rating, a total rating based on individual unemployability, or service connection for a prisoner of war (POW) presumptive disease?

COMMENTS:

1. The relevant facts can be briefly stated. On November 13, 1992, the BVA issued a decision denying the veteran entitlement to a disability rating of greater than 30 percent for post-traumatic stress disorder (PTSD), and to a total rating based upon individual unemployability. On March 27, 1993, the veteran's attorney advised VA that he had been retained to represent the veteran in a claim for an increase in his PTSD rating as well as a claim for individual unemployability. [1] The veteran's claims were denied by the regional office and a notice of disagreement concerning the claim for an increased

[1] The veteran's attorney subsequently filed a fee agreement with the BVA as required by 38 U.S.C. § 5904(c)(2) and 38 C.F.R. § 20.609(g). The fee agreement was fully contingent upon the successful resolution of the veteran's claim, and included a provision requesting direct payment of attorney fees by VA from past-due benefits.

PTSD rating was filed by the veteran's attorney on January 12, 1994. In a rating decision dated March 22, 1994, the veteran's rating was increased to 50-percent retroactive to July 7, 1993.

2. An attorney may not charge, attempt to charge, solicit, contract for, or receive a fee unless certain conditions are met. Those criteria, as implemented by VA regulations include the following:

> (1) A final BVA decision must have been made with respect to the issue or issues involved. 38 U.S.C. § 5904(c)(1); 38 C.F.R. § 20.609(c)(1);[2]
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> (2) A notice of disagreement which preceded the BVA decision with respect to the issue or issues involved must have been received by the agency of original jurisdiction on or after November 18, 1988. 38 C.F.R. § 20.609(c)(2); and
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> (3) The attorney-at-law or agent must have been retained not later than one year following the date that the BVA decision with respect to the issue, or issues, involved was promulgated. *See* 38 U.S.C. § 5904(c)(1); 38 C.F.R. § 20.609(c)(3).

Here, there is no question that the latter two requirements have been fulfilled. The only issue is whether the November 13, 1992, BVA decision denying the veteran's claim for an increased rating for PTSD qualifies as a final BVA decision for the purpose of permitting payment of attorney

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[2] An exception to this requirement was added in section 303 of Pub. L. No. 102-405, 106 Stat. 1972, 1985 (1992). This provision is codified at 38 U.S.C. § 5904(c)(3) and provides that a reasonable fee may be charged or paid for services of attorneys or agents after October 9, 1992, in connection with any proceeding before VA in a case arising out of a loan made, guaranteed, or insured under chapter 37 of title 38 (housing and small business loans).

fees authorized under 38 U.S.C. § 5904(c)(1) and 38 C.F.R. § 20.609(c)(1) for representation provided in connection with the veteran's subsequent claim for increase.

3. In this case, the veteran's PTSD benefits were increased as a result of a claim for increased rating that was preceded by BVA's denial of an earlier similar claim for increase. The question at issue arises because the Court of Veterans Appeals (CVA) has categorized such a claim as a "repeat claim"[3] which is not the same as a reopened claim and constitutes "a different claim based, at least in part, upon different facts." *Suttman v. Brown*, 5 Vet. App. 127, 136 (1993). As construed by the CVA, repeat claims are new claims, and, while they must be well-grounded, they are not required to meet the new and material evidence requirements of 38 U.S.C. § 5108. *Id. See also Genous v. Brown,* 5 Vet. App. 422, 425 (1993) (*citing Abernathy v. Principi*, 3 Vet. App. 461 (1993) (term "reopening" is inapplicable to previously denied pension claims); *Procelle v. Derwinski*, 2 Vet. App. 629, 631 (1992) (a renewed claim for increased rating is not a reopened claim and therefore not subject to the new and material evidence requirements of 38 U.S.C. § 5108).

4. When viewed from the perspective of the CVA's analysis in this line of cases, it could be concluded, because the present claim in this case differs from the earlier one denied by BVA, that attorney fees may not be charged. We believe, however, such an interpretation is inconsistent with congressional intent as it would effectively preclude attorney representation regarding repeat claims such as those for increased ratings, for individual unemployability, for non-service connected pension, or for service connection for a POW presumptive disease. Under CVA's analysis, such repeat claims would always be termed new claims due to the constantly changing nature of a claimant's physical or mental condition. *See Suttman v. Brown*, 5 Vet. App. 127, 136 (1993).

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[3] The term "repeat claim" is not defined in either title 38 of the United States Code or title 38 of the Code of Federal Regulations. *Cf.* 38 C.F.R. § 3.160.

5. The VA attorney fee provisions are currently codified at 38 U.S.C. §§ 5904 and 5905 and were added as a result of the enactment of the Veterans' Judicial Review Act (VJRA), Pub. L. No. 100-687, Div. A, 102 Stat. 4105, 4108 (1988). Although neither the language nor the structure of the VJRA addressed this issue, the legislative history supports an interpretation that once BVA has evaluated the merits of a claim and issued its first adverse decision, an attorney fee may be charged for services related to contesting issues raised in a subsequent "repeat" claim. The Senate Report on S. 11 (the bill that eventually became the VJRA) contains a discussion of the attorney-fee provisions of that bill and specifically addresses the need to permit attorneys an opportunity to shape the administrative record.

> This provision is the result of a balancing of two important considerations: On the one hand, the Committee's wish to preserve, to as great an extent as possible, the present system of claims adjudication . . . relying primarily on representation by service officers of the veterans' organizations and with minimal attorney involvement; and, on the other hand, the appropriateness of permitting the attorney, whose job it will be to present the case on appeal to the [CVA], to have some meaningful opportunity to shape the administrative record he or she will be arguing.

S. Rep. No. 418, 100th Cong., 2d Sess. 66 (1988).

6. The above passage supports the conclusion that Congress did not intend to restrict an attorney's ability to represent a claimant to the extent of completely eliminating the attorney's opportunity to develop the administrative record. Classifying "repeat claims" for increased ratings, for individual unemployability, or for pension, etc. as new claims for purposes of determining whether attorney fees are payable, however, would eliminate attorneys' opportunities to charge fees in those cases. This, in turn, would preclude attorneys from developing the record in those cases and thereby adversely affect their ability to effectively represent those types of claimants before the CVA. We do not believe this

result strikes an equitable balance between the need to preserve VA's nonadversarial claims adjudication system and the "appropriateness of permitting the attorney . . . to have some meaningful opportunity to shape the administrative record he or she will be arguing." Id.

7. Additional support for this conclusion can be found in Senator Cranston's floor statement of October 18, 1988. [4]

> I realize that some have advocated limiting an attorney's involvement exclusively to court review of a case. But, because this measure allows for court review only of the record made by the Agency, limiting an attorney's involvement to court proceedings would, in many instances, preclude a veteran from receiving any assistance from an attorney because the attorney would be unable to improve the agency record. . . . Permitting an attorney representing a veteran to seek directly to reopen a BVA decision before the regional office would avoid these problems. It would have the further benefit of promoting the possibility of a claim being resolved finally before the regional office or the BVA without resort to court action — a result which in many cases would be advantageous for the veteran in terms of speedy justice and the cost of the attorney's time.

134 Cong. Rec. 31,469 (1988).

8. In enacting the fee provisions of the VJRA, Congress clearly sought to permit attorney involvement in VA cases,

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[4] This view was shared by the Chairman of the House Veterans Affairs Committee, who mentioned the attorney-fee provisions while recommending that the House of Representatives concur in the compromise version of S. 11 passed by the Senate. "If the BVA disallows an appeal and the veteran then retains an attorney who attempts to have the claim reopened or reconsidered by the BVA, a fee may be charged." 134 Cong. Rec. 31,770 (statement of Rep. Montgomery).

even at the administrative level, if advantageous for the claimants. This case is an example of such a situation. The attorney did not become involved in the case until after BVA denied the veteran's claim for an increased PTSD rating. Less than one year after the commencement of the attorney's activity, however, the veteran was granted a retroactive increase for his PTSD. Moreover, a review of the veteran's claims file reveals that the evidence relied upon by VA in granting the increased rating included a medical statement the attorney submitted in support of an increased PTSD rating. There is, therefore, ample evidence that the attorney's representation was directly related to the granting of the increased rating which previously had been denied by the BVA.

HELD:

The prerequisite of a final decision by the Board of Veterans' Appeals (BVA) prior to charging an attorney fee contained in 38 U.S.C. § 5904(c)(1) and 38 C.F.R. § 20.609(c)(1) is satisfied when a "repeat claim" for benefits is filed after a final BVA decision has been issued regarding an earlier, similar claim, *e.g.*, a claim for pension, an increased rating, a total rating based upon individual unemployability, or service connection for a prisoner of war presumptive disease.

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