

Date: March 26, 1997

VAOPGCPREC 12-97

From: General Counsel (022)

Subj: Payment of Attorney Fees From Past-Due Benefits Under
38 U.S.C. § 5904(d)--XXXXXXXX, XXXXX X. X XX XXX XXX

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

QUESTION PRESENTED:

a. Whether an attorney representing a successful claimant before the Department of Veterans Affairs (VA) may collect attorney fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d), and from past-due benefits under 38 U.S.C. § 5904(d), without refunding to the claimant the amount of the smaller fee?

b. If an attorney may not collect both an EAJA fee and a section 5904(d) fee without refunding to the claimant the smaller fee, what action must the Board of Veterans' Appeals (Board) take where the attorney is otherwise eligible for attorney fees under both the EAJA and 38 U.S.C. § 5904(d)?

c. Where a case has been remanded or reversed by the United States Court of Veterans Appeals (CVA), must the Board, as a matter of practice, in making its determination as to either payment of attorney fees from past-due benefits under 38 U.S.C. § 5904(d) or reasonableness of fee under 38 U.S.C. § 5904(c)(2) determine whether the attorney has received fees under the EAJA?

COMMENTS:

1. The record indicates that the claimant's attorney has been authorized payment of attorney fees under the EAJA, 28 U.S.C. § 2412(d). Apparently, it is your view that the attorney also meets the criteria for a fee from past-due benefits under 38 U.S.C. § 5904(d), presumably for the same work for which he was awarded the EAJA fee.

2. Section 5904(d) of title 38, United States Code defines VA's responsibility to pay attorney fees directly from past-due benefits in cases where the fee agreement provides that

the total amount of the fee payable to the attorney is contingent on whether the case is resolved in a manner favorable to the claimant. Section 5904(d) provides that the total contingency fee payable by VA to an attorney who represents a claimant may not exceed 20 percent of the total amount of any past-due benefits awarded on the basis of the claim.

3. Under the EAJA, certain prevailing parties in litigation against the United States government may recover attorney fees at statutory rates unless the government's position in the litigation was substantially justified. See 28 U.S.C. § 2412(d)(1)(A). Section 506(a) of the Federal Courts Administration Act of 1992 (FCAA), Pub. L. No. 102-572, 106 Stat. 4506, amended 28 U.S.C. § 2412(d)(2)(F) to make the EAJA applicable to the CVA. See *Jones v. Brown*, 41 F.3d 634, 635-36 (Fed. Cir. 1994). In addition, section 506(c) of the FCAA defines the relationship between attorney fees awarded under 28 U.S.C. § 2412 and 38 U.S.C. § 5904(d) and how the fees should be allocated if fees are awarded under both statutes. Section 506(c) provides in pertinent part that:

Section 5904(d) of title 38, United States Code, shall not prevent an award of fees and other expenses under section 2412(d) of title 28, United States Code. Section 5904(d) of title 38, United States Code, shall not apply with respect to any such award but only if, where the claimant's attorney receives fees for the same work under both section 5904 of title 38, United States Code, and section 2412(d) of title 28, United States Code, the claimant's attorney refunds to the claimant the amount of the smaller fee.

Pub. L. No. 102-572, § 506(c), 106 Stat. 4506, 4513 (28 U.S.C. § 2412 note).

4. In response to your first question, section 506(c) of the FCAA expressly provides that, where the claimant's attorney receives fees for the same work under both 38 U.S.C. § 5904 and 28 U.S.C. § 2412, "the claimant's attorney refunds to the claimant the amount of the smaller fee." The award under

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section 5904(d) allows the claimant's attorney to collect his or her fee out of the claimant's past-due disability benefits,

while the EAJA award is paid by the government to the claimant to defray the cost of legal services. See *Curtis v. Brown*, 8 Vet. App. 104, 108-09 (1995); Cf. *Russell v. Sullivan*, 930 F.2d 1443, 1446 (9th Cir. 1991). The EAJA award therefore serves as a reimbursement to the claimant for fees paid out of the past-due disability benefits. Thus, the claimant's attorney is permitted to seek recovery of attorney fees under both 38 U.S.C. § 5904 and 28 U.S.C. § 2412. The attorney may keep the larger of the fees recovered, but must refund the amount of the smaller fee to the claimant in accordance with section 506(c) of the FCAA.

5. Your next question pertains to what action the Board must take where the claimant's attorney is eligible for attorney fees under both the EAJA and from past-due benefits under 38 U.S.C. § 5904(d). You question whether the Board should deny the claim under 38 U.S.C. § 5904(d), allow the claim, but impose a setoff equal to the amount of the EAJA fees, or take some other action. As discussed above, the only action necessary where the claimant's attorney is eligible for attorney fees under both the EAJA and from past-due benefits under section 5904(d) for the same work performed is for the attorney to refund the amount of the smaller fee to the claimant. There is no authority for the Board to take any action, such as offset of the amount of the EAJA fees, to ensure that the attorney fulfills his responsibility to refund the smaller fee to the claimant.¹

6. Your last question asks whether, in the Board's determination as to either payment of attorney fees from past-due benefits under 38 U.S.C. § 5904(d) or reasonableness of fees under 38 U.S.C. § 5904(c)(2), the Board must first determine whether the attorney has received fees under the EAJA where the case

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has been remanded or reversed by the CVA. In light of the above discussion, the direct payment of attorney fees from past-due benefits by VA under 38 U.S.C. § 5904(d) is not

¹ We note that failure of the claimant's attorney to return the amount of the smaller attorney fee to the claimant may subject the attorney to the possibility of criminal prosecution under 38 U.S.C. § 5905 for wrongfully withholding benefits due to the claimant. Moreover, there is, of course, nothing that would preclude the Board from advising the attorney of the attorney's responsibility in this regard.

affected by an award of EAJA fees, although the attorney must refund the amount of the smaller fee. Thus, where the case has been remanded or reversed by the CVA, it does not appear necessary for the Board to first establish whether the attorney has received fees under the EAJA when determining whether attorney fees are payable directly by VA from past-due benefits under section 5904(d).

7. There is, however, no similar statutory provision governing attorney fee agreements not covered by section 5904(d) requiring a claimant's attorney to refund the smaller of the agreed-upon fee or the EAJA fee award. Thus, where the attorney fee agreement is not an agreement which requires direct payment by VA from past-due benefits under section 5904(d), the Board's review of the agreement under 38 U.S.C.

§ 5904(c)(2), to determine whether the fee is excessive or unreasonable, may require the Board to determine whether the attorney has received fees under the EAJA and if so, the amount of the EAJA fees. In such case, the amount of the EAJA fees received would appear to be relevant to the determination of excessiveness or reasonableness of the agreed-upon fee notwithstanding there is no statutory prohibition against the attorney retaining both the agreed-upon fee and the EAJA award. Thus, where a case has been remanded or reversed by the CVA, the Board, in making its determination as to whether the attorney fee is excessive or unreasonable under 38 U.S.C.

§ 5904(c)(2), must determine on a case-by-case basis, the impact of any attorney fees received under the EAJA.²

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HELD:

a. The claimant's attorney is permitted to seek recovery of attorney fees under both 38 U.S.C. § 5904 and 28 U.S.C. § 2412. Section 506(c) of the Federal Courts Administration Act of 1992 expressly provides that, where the claimant's attorney receives fees for the same work under both 38 U.S.C.

² We note that the CVA may address this issue, in *Shaw v. Brown*, U.S. Vet. App. No. 96-496 (Order of December 23, 1996), a case in which the CVA has directed counsel for both parties and interested amici curiae to address issues raised by a provision in the attorney fee agreement under review by the CVA which allows the attorney a contingent fee payment out of past-due benefits as compensation for postremand work, without an offset for any award under the EAJA.

§ 5904(d) and 28 U.S.C. § 2412, the claimant's attorney must refund to the claimant the amount of the smaller fee. The attorney may keep the larger of the fees recovered, but must return the amount of the smaller fee to the claimant.

b. There is no authority for the Board to take any action, such as offset of the amount of the EAJA fees, to ensure that the attorney fulfills his responsibility to refund the smaller fee to the claimant.

c. Where the case has been remanded or reversed by the CVA, the Board does not have to first determine whether the attorney has received fees under the EAJA to determine whether attorney fees are payable directly by VA from past-due benefits under section 5904(d). Where the attorney fee agreement does not require direct payment by VA from past-due benefits under section 5904(d), the Board's review of the agreement under 38 U.S.C. § 5904(c)(2), to determine whether the fee is excessive or unreasonable, may require the Board to determine whether the attorney has received fees under the EAJA and if so, the impact of the EAJA fees on the reasonableness of the agreed-upon fee. Thus, where a case has been remanded or reversed by the CVA, the Board, in making its determination as to whether the attorney fee is excessive or unreasonable under 38 U.S.C. § 5904(c)(2), must determine on a case-by-case basis the impact of any attorney fees received under the EAJA.

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