Date: December 16, 1997

From: Acting General Counsel (022)

subj: Opinion Request Concerning Attorney Fees of XXXXXXXXXXXXXXXXX, in the Claim of XXXXXXX XXXXXXXXX, and XXXXX X. XXXXXX, in the Claim of XXXXX X. XXXXXX

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

#### QUESTION PRESENTED:

Are attorney fees payable in cases in which the decision of the Board of Veterans' Appeals was on the issue of whether a claimant had submitted new and material evidence sufficient to reopen a claim?

### COMMENTS:

- 1. Attorney fees have been requested in two cases in which the Board of Veterans Appeals (BVA) promulgated decisions on the subject of whether new and material evidence had been submitted to justify reopening a claim for service connection. In one case BVA held that the evidence did not warrant reopening and the claim was appealed to the Court of Veterans Appeals (CVA), where the BVA determination was overturned on that issue. In the second case the BVA decided that the evidence warranted reopening and remanded the claim to the Agency of Original Jurisdiction (AOJ) for further action.
- 2. The statute governing payment of attorney's fees, 38 U.S.C. § 5904(c)(1), provides in pertinent part:

Except as provided in paragraph (3), in connection with a proceeding before the Department with respect to benefits under laws administered by the Secretary, 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. Such a fee may be charged, allowed or paid in the case of services provided after such date only if an agent or attorney is retained with respect to such case before the end of the one-year period beginning on that date.

- 3. In implementing the attorney fee statute, the Department has promulgated 38 C.F.R. § 20.609 which states in pertinent part as follows:
  - (c) Circumstances under which fees may be charged. Except as noted in paragraph (d) of this section, attorneys-at-law and agents may charge

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claimants or appellants for their services only if all of the following conditions have been met:

- (1) A final decision has been promulgated by the Board of Veterans' Appeals with respect to the issue, or issues, involved;
- (2) The Notice of Disagreement which preceded the Board of Veterans' Appeals decision with respect to the issue, or issues, involved was received by the agency of original jurisdiction on or after November 18, 1988; and
- (3) The attorney-at-law or agent was retained not later than one year following the date that the decision by the Board of Veterans' Appeals with respect to the issue, or issues, involved was promulgated. (This condition will be considered to have been met with respect to all successor attorneys-at-law or agents acting in continuous prosecution of the same matter if a predecessor was retained within the required time period.)
- 4. The actions taken by the AOJ, BVA, and Court of Veterans Appeals (CVA) may be summarized as follows in the XXXXXX case:

Adjudicator	Date of Action	Issue	Decision
BVA	1989	Service connection (SC) for	Deny
		esophageal reflux	
BVA	Nov. 1993	SC esophageal reflux:	Deny (Evidence was not new
		New and material evidence	and material)
CVA	June 1995	SC esophageal reflux:	Vacate BVA decision (evidence
		New and material evidence	was new and material);
			remand to BVA on SC
BVA	Sept. 1995	SC esophageal reflux	Remand to AOJ
AOJ	Feb. 1996	SC esophageal reflux	Deny claim
BVA	May 1996	SC esophageal reflux	Grant SC
AOJ	Sept. 1996	Rating for esophageal reflux	10%

5. As the table shows, there was an initial, post-VJRA decision by the BVA in November 1993 that denied the veteran's claim for service connection for esophageal reflux because the evidence submitted was not new and material. The CVA reversed that determination and, after additional development and consideration administratively, the claim for service connection was allowed and benefits were paid. The question

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presented by this claim is whether the 1993 decision was "a final BVA decision with respect to the issue or issues involved." 38 U.S.C. § 5904 (c)(1); 38 C.F.R. § 20.609(c)(1). Our conclusion is that the 1993 BVA decision, and the CVA decision vacating it, were "final" as to the "issue involved" because the issue considered was whether new and material evidence had been submitted to justify reopening the claim for service connection and considering it on its merits.

- 6. Under the statutory scheme by which judicial review of decisions on veterans benefits was created, the veteran's claim could not have reached CVA without a "final" decision of BVA. That CVA considered the evidence submitted, and concluded that it was new and material, on its face suggests that the prior BVA action was final. The fact that it was not determinative of the entire issue of entitlement to service connection for this disability pursuant to *Manio v. Derwinski*, 1 Vet. App.140 (1991), is not, we believe, a basis to refuse to acknowledge that a final decision was rendered by BVA which was subsequently appealed to CVA. It has been noted in other contexts that claims for benefits for a disability will be presented piecemeal, with a part that logically precedes other parts being the subject of its own appeal. *See Grantham v. Brown*, 114 F.3d 1156 (Fed. Cir. 1997) ("Downstream" questions of rating not reached if "upstream" issue of service connection not decided in favor of veteran.)
- 7. Our conclusion is that attorney fees are payable where the issue appealed to CVA, following an adverse BVA decision, is the denial of the reopening of a claim based on the failure to have submitted new and material evidence. In such cases, fees may be paid for legal representation on all of the "downstream" issues that flow from CVA's determination that the claim should be reopened.
- 8. The facts in the XXXXXXXX claim, which in some respects are similar to the XXXXXX case, are summarized below.

Adjudicator	Date of Action	Issue	Decision
BVA	1983	Service connection for PTSD	Deny
BVA	1987	SC for PTSD	Deny
BVA	1989	SC for PTSD	Deny
BVA	1996	SC for PTSD	Reopen claim (Evidence is new and material); remand
AOJ	1996	SC for PTSD	Allow

9. Like the XXXXXX case, the XXXXXXXX case involves an attempt to reopen a final decision on a claim for service connection. However, in this case, it was BVA rather

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than CVA that concluded that the recently submitted evidence was new and material. The claim was remanded to the AOJ, which then handled the merits of the claim for service connection. The 1996 BVA decision, although it followed a post-VJRA NOD thereby meeting the second requirement for attorney fees, was not a "final" decision and therefore did not meet the first requirement. It is well-settled that remands by BVA are not final decisions. *Matter of Stanley*, 9 Vet. App. 203, 207 (1996). Additionally, it is well-settled that favorable action by the AOJ following a BVA remand is not a final BVA decision so as to permit payment of attorney fees. *Id.* at 208. Accordingly, attorney fees are not payable where BVA holds that the evidence warrants reopening of a claim for service connection and remands the case for further action on the merits.

10. Although there is no ambiguity that would require reference to legislative history, we note that the result above is consistent with the stated intent of the revision of VA's longstanding statute governing payment of attorney fees in claims for benefits. This was described at some length in *Matter of Stanley*, 10 Vet. App. 104, 107-108 (1997), concluding that:

With respect to limiting payable fees, the 1988 House Committee Report states the two major purposes as protecting "the interests of veterans from the perceived threat . . . of excessive fees for . . . services, which essentially required only the preparation and presentation of an application for benefits," and Congress' desire to continue, at least initially, the informal and nonadversarial structure of the veterans benefits process. . . . However, once there is a final Board decision with which the veteran is not satisfied, the process, as is permissible under the statute, can become adversarial. (Citations omitted.)

11. Like the appellant in *Matter of Stanley*, 10 Vet. App.104, 108 (1997), the claimant here:

[W]as awarded benefits by the RO under the nonadversarial system of VA claims processing for his PTSD condition. The PTSD claim was never the subject of a final BVA decision, and therefore, no payment of attorney fees is warranted or permitted for services rendered before VA and the Board in connection with that claim.

Lacking a final, post-VJRA BVA decision on the issue of service connection, the claimant's attorney does not qualify for a fee under the statute because the benefits sought by his client were awarded under the nonadversarial system.

# <Page 5> <u>HELD</u>:

In a case where BVA has denied reopening of a claim for service connection based on failure to submit new and material evidence and that determination is reversed by CVA and service connection is ultimately allowed, attorney fees may be paid. In a claim where BVA has determined that new and material evidence has been submitted and has remanded the claim to the AOJ, attorney fees may not be paid because a final decision within the meaning of 38 U.S.C. § 5904 (c)(1) is lacking.

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