

**Department of
Veterans Affairs**

Memorandum

Date: December 3, 2015

VAOPGCPREC 4-2015

From: General Counsel (022)

Subj: Impact of veteran's death on dispute regarding potential attorney's fees; Impact of accrued-benefits claim on potential attorney's fees

To: Executive-in-Charge, Board of Veterans' Appeals (01)

QUESTIONS PRESENTED:

1. Is the Board of Veterans' Appeals (Board), upon a veteran's death, required to dismiss the veteran's dispute as to payment of potential attorney's fees under 38 U.S.C. § 5904(d) from money withheld from past-due disability benefits awarded to the veteran during the veteran's lifetime?
2. If the Board is required to dismiss the dispute, may a party pursue payment of the withheld money as accrued benefits pursuant to 38 U.S.C. § 5121?
3. If the Board is required to dismiss the dispute, what effect does that dismissal have on the underlying decisions regarding that issue?

HELD:

1. Upon a veteran's death, the Board is required to dismiss the veteran's dispute as to payment of potential attorney's fees under 38 U.S.C. § 5904(d) when the money withheld from past-due disability benefits awarded to the veteran meets the statutory definition for accrued benefits.
2. A claim, pending at the time of a veteran's death, challenging an attorney's entitlement to payment of attorney fees under section 5904 from the veteran's retroactive periodic monetary benefits may provide a basis for an accrued benefits claim under section 5121, because such a claim concerns entitlement to periodic monetary benefits allegedly due and unpaid to the veteran at the time of death.
3. The Board's dismissal of the veteran's dispute regarding payment of attorney's fees renders all underlying decisions regarding that issue that were not final at the time of the veteran's death legal nullities.

DISCUSSION:

1. These issues arise in an appeal to the Board by a veteran's widow. In 2001, the veteran's attorney ended his representation of the veteran. In June 2003, the Board granted the veteran service connection for a disability and awarded benefits retroactive to 1992. In October 2003, the attorney requested that, pursuant to a direct-pay fee

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agreement he had with the veteran, the Department of Veterans Affairs (VA) pay him fees based on the past-due benefits awarded to the veteran.¹ Later in October 2003, a VA regional office (RO) determined that the attorney was entitled to \$41,920.47, or 20 percent of the veteran's past-due benefits (hereinafter referred to as "potential attorney's fees"). The veteran disagreed with the RO's determination and, *inter alia*, argued to the Board that the award of \$41,920.47 to the veteran's former attorney was unreasonable. In 2005, the Board remanded the veteran's dispute to the RO for additional development. The veteran died in December 2006, while the case was on remand to the RO. The veteran's widow separately argued to the Board that she was entitled to accrued benefits regarding the potential attorney's fees. In separate decisions issued in February 2008, the Board dismissed the veteran's dispute of the award of \$41,920.47 to his former attorney and referred to the RO the widow's claim for accrued benefits regarding the potential attorney's fees. In May 2008, the RO notified the attorney that he would receive \$41,920.47 in attorney's fees because the Board had terminated the veteran's appeal. In May 2009, the RO informed the veteran's widow that her claim for potential attorney's fees could not be pursued via an accrued-benefits claim. The veteran's widow appealed that decision to the Board, which is the appeal underlying this opinion request.

Veteran's Claim of Entitlement to Benefits

2. The Board referenced *Landicho v. Brown*, 7 Vet. App. 42, 47 (1994), and 38 C.F.R. § 20.1302 when it asked in the underlying opinion request whether its February 2008 dismissal of the veteran's dispute regarding payment of fees to his former attorney was correct. The United States Court of Appeals for Veterans Claims (Veterans Court) concluded in *Landicho* that veterans' claims "under chapter 11 do not survive their death" and that it must dismiss any appeals regarding chapter 11 benefits pending before it when the veteran presenting those claims dies. 7 Vet. App. at 47. The Veterans Court found the logic of *Landicho* was also applicable when the veteran dies with an appeal pending before the Board. *Smith v. Brown*, 10 Vet. App. 330, 333-34 (1997).

3. The Board stated that the widow's accrued-benefits claim leading to its inquiry involved the retroactive award of periodic monetary benefits to the veteran based on service connection for a cervical spine disability, meaning the veteran's entitlement was established pursuant to statutes contained in chapter 11 of title 38, United States Code. See, e.g., 38 U.S.C. §§ 1110, 1131. The issues of entitlement to a benefit and to whom VA will pay that benefit are not one and the same in every case. Cf. *Snyder v. Nicholson*, 489 F.3d 1213, 1218 (Fed. Cir. 2007) (discussing apportionment of a

¹ Under 38 U.S.C. § 5904(d), an agent or attorney representing a claimant may receive fees directly from VA from any past-due benefits awarded on the basis of a claimant's claim if a direct-pay fee agreement has been filed with VA and meets certain requirements.

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veteran's benefits during incarceration); *Shephard v. Shinseki*, 26 Vet. App. 159, 163-68 (2013) (same); see also 38 U.S.C. § 5307. We conclude that the Board, upon the veteran's death, properly dismissed his dispute regarding the potential attorney's fees withheld from his disability benefits award pursuant to *Landicho*, as applied to the Board in *Smith*. The law is well settled that a "veteran's claim to disability compensation under chapter 11 of title 38 is terminated by his or her death." *Richard v. West*, 161 F.3d 719, 723 (Fed. Cir. 1998). This is true when entitlement to benefits was established during the veteran's life, meaning the disability benefits were awarded to the veteran during life, if the funds at issue remained unpaid at the time of his or her death. *Youngman v. Shinseki*, 699 F.3d 1301, 1303-04 (2012). Here, entitlement to benefits was established during the veteran's life, and the RO found the former attorney entitled to potential attorney's fees. However, because the veteran disputed payment of the potential attorney's fees and that dispute was pending on appeal when the veteran died, the money withheld for payment of potential attorney's fees was never paid.

4. The Board asked in the alternative whether 38 C.F.R. § 20.1302 provided a basis for dismissing the veteran's claim. Section 20.1302 provided at the time of the veteran's death that "[a]n appeal pending before the [Board] when the appellant dies will be dismissed." 38 C.F.R. § 20.1302 (2006). VA chose not to limit this rule to the chapter 11 claims discussed in *Landicho* and *Smith* because it found "no meaningful distinction between disability compensation and other claims which might come before the Board." 62 Fed. Reg. 55,169 (Oct. 23, 1997). In *Loreth v. Shinseki*, 23 Vet. App. 159, 162 (2009), the Veterans Court described "the overreach of § 20.1302 [as] troubling" as applied to a claim for reimbursement of transportation costs related to medical treatment, but found the validity of the regulation was irrelevant in the case before it because dismissal of the veteran's claim did not affect the surviving spouse's claim "in her dual capacity as the guardian of the veteran and a third-party payee." We conclude that any concerns about the expansive scope of section 20.1302 are not present in the case before the Board because the veteran's entitlement to the benefits at issue was established pursuant to chapter 11, paralleling *Landicho* and *Smith*. The fact that those benefits might be payable as attorney's fees under section 5904(d) does not alter their nature, because the October 2003 RO decision that the veteran's former attorney was entitled to fees was not final and the possibility remained that the veteran would receive payment of his past-due benefits that were withheld for potential payment of attorney's fees. Accordingly, section 20.1302 is applicable to this case.

5. The Board noted that the veteran's dispute of fees requested by his former attorney constituted a simultaneously contested claim, i.e., a claim in which multiple parties seek to establish entitlement to a benefit and the award to one party will diminish the award to the other(s). See 38 C.F.R. § 20.3. The United States Court of Appeals for the Federal Circuit (Federal Circuit) has held that disputes regarding eligibility for attorney's fees withheld from past-due disability benefits are simultaneously contested claims. *Mason v. Shinseki*, 743 F.3d 1370, 1374 (2014). A challenge disputing the reasonableness of potential attorney's fees, pursuant to 38 U.S.C. § 5904(c)(3)(A),

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would similarly be considered a simultaneously contested claim. Statutes and regulations provide different rules in a simultaneously contested claim regarding notice, the timeline to dispute adverse decisions, the timeline for submission of evidence by the parties, and how hearings are conducted. See, e.g., 38 U.S.C. § 7105A; 38 C.F.R. §§ 19.100-19.102, 20.3, 20.500-20.504, 20.713, and 20.1408. However, no statute or regulation creates an exception to the general rule that a veteran's interest in chapter 11 benefits ends upon his or her death. *Id.* Nor does any case require a different outcome. Therefore, we conclude that the specific procedures required in developing and adjudicating simultaneously contested claims do not alter the requirement that a veteran's pending chapter 11 claim must be dismissed upon his or her death.

Widow's Claim of Entitlement to Benefits

6. Section 5121 of title 38, United States Code, allows an accrued-benefits claimant to pursue a claim that is "derivative of the veteran's claim," but that is nevertheless legally permissible after the veteran's death. *Zevalkink v. Brown*, 102 F.3d 1236, 1241 (Fed. Cir. 1996). Accrued benefits are "[p]eriodic monetary benefits . . . due and unpaid" at the time of the veteran's death, based on "existing ratings or decisions or those based on evidence in the file at date of death." 38 U.S.C. § 5121(a). Put another way, the veteran's entitlement to the underlying benefits must be established for an accrued-benefits claim to succeed; once the veteran's entitlement is established, the accrued-benefits claimant may then demonstrate entitlement to "[p]ayment of [those] accrued benefits" by establishing his or her priority amongst possible accrued-benefits claimants. 38 U.S.C. § 5121. Accrued benefits are payable to a limited class of claimants, including, *inter alia*, "[t]he veteran's spouse."² *Id.*; see *Youngman*, 699 F.3d at 1304 ("[b]y statute, § 5121(a) limits the payment of benefits due at the veteran's death, to" parties specified therein).

7. The Veterans Court has held that retroactive awards of disability compensation benefits payable in a lump sum – such as retroactive disability benefits awarded but not paid to the veteran during life – qualify as accrued benefits. *Nolan v. Nicholson*, 20 Vet. App. 340, 348 (2006) (citing *Wilkes v. Principi*, 16 Vet. App. 237, 241-42 (2002)). Although those benefits are paid in a lump sum, they nevertheless qualify as an accrued benefit because the nature of the underlying benefit meets the statutory definition. *Id.* In the case underlying this opinion request, the benefits sought by the veteran and his widow are a portion of the veteran's retroactive disability compensation and, therefore, are within the definition of accrued benefits. The fact that the veteran's former attorney has a potential right to payment of those benefits pursuant to section 5904(d) does not alter the nature of those benefits as concerns the veteran and his widow and, therefore,

² We offer no opinion as to whether the veteran's widow meets the statutory definition of spouse for accrued-benefits purposes but assume she does in this case for purposes of this opinion.

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has no impact on the interrelationship between the veteran's death and the widow's ability to pursue payment of chapter 11 benefits as accrued benefits.

8. We begin the inquiry into this issue by reviewing the language of section 5904. *Bazalo v. West*, 150 F.3d 1380, 1382 (Fed. Cir. 1998) (stating that statutory review begins by "examining the language to determine the plain meaning of the words used by Congress"). Section 5904(d) provides for the payment of attorney's fees from "past-due benefits awarded on the basis of the claim" in which the attorney represented the veteran. 38 U.S.C. § 5904(d). However, neither section 5121 nor section 5904 contains language addressing the impact of an attorney's request for fees on an accrued-benefits claim, to include the ability of an accrued-benefits claimant to dispute whether VA should pay attorney's fees from a veteran's past-due benefits award. See 38 U.S.C. §§ 5121, 5904. Similarly, the regulations implementing sections 5121 and 5904 at the time of the veteran's death, and currently, do not address these issues. See 38 C.F.R. §§ 3.1000 (2006, 2015), 14.636 (2015), 20.609 (2006).³

9. When two statutes exist regarding the same subject, both should be given effect if possible. See *Morton v. Mancari*, 417 U.S. 535, 551 (1974) (citing *U.S. v. Borden Co.*, 308 U.S. 188, 198 (1939)). It is possible to read section 5121 and section 5904 as both applying based on the facts presented by the appeal before the Board, and we conclude that this is the correct reading as discussed below. To conclude that section 5121 renders section 5904 inoperative, or that section 5904 precludes a claim pursuant to section 5121, would require us to read language into those statutes that Congress did not use.

10. We conclude that a claim, pending at the time of a veteran's death, challenging an attorney's entitlement to payment of attorney fees under section 5904 from the veteran's retroactive periodic monetary benefits may provide a basis for an accrued benefits claim under section 5121 by a proper accrued-benefits claimant. First, as stated above, the amounts at issue would satisfy the definition of accrued benefits because the claim by the veteran and/or the accrued benefits claimant would be a claim of entitlement to a portion of periodic monetary benefits allegedly due and unpaid to the veteran. In the

³ The Board also referred to Veterans Benefits Administration (VBA) Adjudication Procedures Manual, M21-1 Manual Rewrite (M21-1MR) provisions, specifically M21-1MR, pt. I, ch. 3, ¶ C.18.d (Jan. 22, 2003) and M21-1MR, pt. I, ch. 3, ¶ C.17.f (Sept. 30, 2010). VBA's manual provisions are generally not binding on the Board, whereas precedential opinions from the General Counsel are binding upon it. 38 C.F.R. § 19.5. Therefore, the Board's question as to the impact of the language change between 2003 and 2010 will be mooted upon issuance of this opinion. Notably, however, we do not read M21-1MR, pt. I, ch. 3, ¶ C.18.d (Jan. 22, 2003), M21-1MR, pt. I, ch. 3, ¶ C.17.f (Sept. 30, 2010), or the current provisions contained in M21-MR, pt. I, ch. 3, ¶ C.5.f (July 31, 2015), as conflicting with this opinion.

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instant case, the fact that the RO had found the veteran's former attorney entitled to fees does not alter this conclusion, because the issue was pending on appeal before the Board when the veteran died. If the Board had reduced the attorney's fees owed to the veteran's former attorney to an amount less than 20 percent of the veteran's past-due benefits, the veteran would have received some or all of the withheld amount as part of his past-due benefits.

11. Second, the fact that the issue regarding payment of attorney's fees was not finally resolved does not preclude the veteran's widow from using an accrued-benefit claim to continue his arguments, but rather satisfies a requirement for such a claim. See *Jones v. West*, 136 F.3d 1296, 1299 (1998) (“[I]n order for a surviving spouse to be entitled to accrued benefits, *the veteran must have had a claim pending at the time of his death for such benefits* or else be entitled to them under an existing rating or decision.”) (emphasis added). To conclude otherwise would ignore the statutory language allowing accrued benefits based on “existing ratings or decisions *or those based on evidence in the file at date of death.*” 38 U.S.C. § 5121(a) (emphasis added). See *Corley v. U.S.*, 556 U.S. 303, 314 (2009).⁴

12. Third, nothing in section 5904 suggests a contrary conclusion. The fact that a claim pending at the veteran's death involved a challenge to payment of attorney fees under section 5904(d), rather than an appeal of the denial of a claim for disability benefits is immaterial if the benefits at issue in both cases are periodic monetary benefits allegedly due and unpaid to the veteran. Moreover, our conclusion that an accrued-benefits claimant is able to contest the reasonableness of attorney's fees as part of an accrued-benefits claim is also consistent with “congressional intent to protect veteran's benefits

⁴ Regarding the finality of the veteran's disputes of whether his former attorney should be paid fees, the Board indicated that the veteran argued both that his former attorney was not eligible to have VA withhold attorney's fees based on the fee agreement and that the fees withheld were not reasonable. The Board had original jurisdiction to address the issue of reasonableness upon a motion or on its own initiative and to “order a reduction in the fee called for in the agreement if it f[ound] that the fee [was] excessive or unreasonable in light of the standards set forth in [section 20.609(e)]” in 2005 when the veteran's appeal was before it. 38 C.F.R. § 20.609(i) (2005). The determination as to whether a fee agreement met the criteria of section 5904(d) was an issue for initial adjudication by the RO at that time. 38 C.F.R. § 20.609(h)(4) (2005). We offer no opinion as to which aspects of the veteran's disputes of payment to his attorney remained non-final at the veteran's death. The Board should consider this issue, however, as non-final decisions are dismissed “to ensure that the [Board] decision and the underlying RO decision(s) would have no preclusive effect in the adjudication of any accrued-benefits claim,” see *Smith*, 10 Vet. App. at 333, while final decisions remain undisturbed. See *Zevalkink*, 102 F.3d at 1241; *Haines v. West*, 154 F.3d 1298, 1301 (1998) (holding that an accrued-benefits claimant may not pursue a collateral attack on an otherwise final agency decision).

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from improper diminution by excessive legal fees” evidenced in section 5904. *Scates v. Principi*, 282 F.3d 1362, 1366 (Fed. Cir. 2002); see also S. Rep. No. 109-297, at 5-7, 18-19 (July 27, 2006). Congress has historically placed great weight upon protecting veteran’s benefits from excessive reduction by attorney’s fees. For example, in 1958 – the year Congress enacted the operative language regarding accrued benefits now contained in section 5121, see Pub. L. 85-857, § 3021, 72 Stat. 1105 (Sept. 2, 1958) – attorney’s fees could “not exceed \$10 with respect to any one claim.” Pub. L. 85-857, § 3404(c)(2). Prior to 1958, the language protecting accrued benefits was even stronger than it is today, specifying that these benefits “shall not be considered a part of the assets of the estate of such deceased person, nor be liable for the payment of the debts of said estate in any case whatsoever but shall inure to the sole and exclusive benefit of the widow or children.” 38 U.S.C. § 96 (1940). This history demonstrates that Congress has long sought to preserve a survivor’s right to a veteran’s benefits.

13. Congress has more recently allowed greater freedom for an attorney to charge fees, requiring VA to pay a portion of disability benefits to which a veteran is legally entitled directly to an attorney in certain circumstances. 38 U.S.C. § 5904. This means the attorney has a superior claim for payment of the veteran’s benefits than does the veteran when statutory criteria are satisfied; however, those conditions include that the contract meet certain criteria, and that the ultimate fee charged be reasonable. 38 U.S.C. § 5904(c)(3)(A); see also *Scates*, 292 F.3d at 1366 (successful claimant’s attorney “may receive only a fee that fairly and accurately reflects his contribution to and responsibility for the benefits awarded”); 38 C.F.R. § 14.636(e) (providing that VA will consider factors such as the “complexity of the case,” the “amount of time the representative spent on the case,” and the “results the representative achieved” in addressing the reasonableness of a fee agreement).

14. Congress has charged VA with determining whether a fee agreement meets those criteria and directed that VA may, on its own motion, “review a fee agreement . . . and may order a reduction in the fee called for in the agreement if the Secretary finds that the fee is excessive or unreasonable.” 38 U.S.C. § 5904(c)(3)(A). Therefore, Congress provided that by involving VA in the process of collecting their fees, the attorney has voluntarily opted into the additional statutory requirements of section 5904, which include that a non-contract party, VA, has the authority to review the reasonableness of the fee agreement without a request. 38 U.S.C. § 5904(c)(3)(A). Congress no more limited VA’s ability to review the reasonableness of fee agreements upon the death of the veteran than it limited the attorney’s ability to pursue attorney’s fees upon the death of the veteran.⁵ See 38 U.S.C. § 5904(c)(3)(A); compare 38 U.S.C. § 5904(d).

⁵ Certain requests for payments other than claims for accrued benefits may survive the veteran’s death in particular circumstances, even though an attorney would not be a proper accrued-benefits claimant. See *Phillips v. Shinseki*, 581 F.3d 1358, 1366-67 (2009) (finding that claims for entitlement to attorney fees pursuant to the Equal Access to Justice Act were not extinguished by the veteran’s death in particular circumstances);

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Accordingly, nothing in section 5904 precludes VA from applying the reasonableness requirements of section 5904(c) or the eligibility requirements of section 5904(d) as necessary to decide an accrued-benefits claim.

15. Finally, our conclusion is consistent with the recognized purpose of the accrued-benefits statute, which generally permits an accrued-benefits claimant to stand “in the exact position vis-à-vis adjudication of the deceased veteran’s underlying disability-compensation claim as did the veteran immediately prior to his or her death,” subject to the statutory limitation that an accrued-benefits claim will be decided based upon the evidence in file at the date of the veteran’s death. *Landicho*, 7 Vet. App. at 52; see also *Zevalkink v. Brown*, 6 Vet. App. 483, 490 (1994), *aff’d* 102 F.3d 1236 (1996) (“[w]hat the law has given to the [accrued-benefits claimant] is, basically, the right to stand in the shoes of the veteran”). Where a veteran’s challenge to payment of attorney fees under section 5904(d) was pending at the time of the veteran’s death, allowing an accrued-benefits claimant to stand in the shoes of the veteran for purposes of challenging such payments plainly furthers the purpose of section 5121 to permit certain survivors to receive payments “due and unpaid” to the veteran during his or her lifetime.

Impact of the Board’s dismissal of the appeal regarding attorney’s fees

16. Lastly, we conclude that any non-final decision regarding the veteran’s former attorney’s request for payment of fees was also rendered a nullity by the Board’s February 2008 dismissal. As noted above, the veteran challenged both his former attorney’s eligibility to have fees withheld and the reasonableness of the fees withheld, but the Board’s description of facts does not make clear whether both arguments remained pending at his death. While section 5904(c)(3)(A) provides no time limitation as to the period to dispute a fee agreement, and the regulatory provisions applicable at the time of the veteran’s death also contained no such limitation, 38 C.F.R. § 20.609 (2006), the Federal Circuit has held that the 60-day appeal period for simultaneously contested claims applies to an attorney attempting to dispute the denial of attorney’s fees. *Mason*, 743 F.3d at 1374.

Suguitan v. McDonald, 27 Vet. App. 114, 118-19 (2014) (“[N]either [the Veterans] Court nor the Federal Circuit has ruled that, where the benefit is a non-accrued benefit, the party seeking substitution is left without recourse.”); *Pappalardo v. Brown*, 6 Vet. App. 63, 65 (1993) (holding that entitlement to payment for specially adapted housing was not an accrued benefit, but that remand to resolve the issue of a third-party claim pursuant to 38 C.F.R. § 36.4406 (1993) was required despite the veteran’s death). We do not provide any further analysis regarding the question of whether an attorney may pursue payment of attorney’s fees that were withheld from a veteran’s past-due benefits award following the veteran’s death, as that issue falls outside the scope of the underlying opinion request.

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17. The timeline to appeal simultaneously contested claims pursuant to section 7105 was 60 days at the time of the veteran's death and currently. 38 U.S.C. § 7105A(a) (2003), (2015). Moreover, a VA regulation currently provides "120 days from the date of the final VA action" for a claimant or appellant to move for review of the fee agreement regarding reasonableness. 38 C.F.R. § 14.636(i). The veteran's widow is incapable of satisfying the aforementioned deadlines regarding the relevant decisions issued during the veteran's life. The dismissal of the most recent decision eliminates this preclusive effect for the accrued-benefits claimant, rendering any prior non-final decision leading to that decision a legal nullity. *Smith*, 10 Vet. App. at 333.

18. Based on all of the above, we conclude that the two decisions issued by the Board in February 2008 correctly applied *Landicho* and *Smith*, as the deceased veteran's non-final attempts to obtain payment for chapter 11 disability benefits by disputing his former attorney's request for fees were dismissed. Further, we conclude that the veteran's widow is placed in the same position as her husband in pursuing an accrued-benefits claim and may present all arguments regarding payment of the potential attorney's fees pursuant to section 5904 that were not finally adjudicated at the time of the veteran's death. We further conclude that the decision by the RO in 2008 to award fees to the veteran's former attorney and its decision in 2009 that the veteran's widow was unable to dispute issues regarding the payment of attorney's fees that were not final at the time of the veteran's death were each mistaken. In this regard, the RO appeared to believe that its October 2003 initial eligibility determination regarding VA's potential payment of attorney's fees remained effective. However, if the issue of eligibility was not final at the time of the veteran's death, the Board's February 2008 dismissal of the veteran's claim rendered the RO's October 2003 decision regarding that issue a nullity. If this is the situation, the veteran's former attorney was placed in the position of having no decision on his October 2003 request for fees, meaning no valid decision regarding that issue exists.

19. Regardless of the finality of the eligibility determination, the Board's description of facts makes it clear that the issue of reasonableness was not final at the time of the veteran's death and that the veteran's widow has attempted to pursue this dispute. Even assuming the eligibility determination became final during the veteran's life, any decision regarding the issue of reasonableness was rendered a nullity by the Board's February 2008 dismissal of the veteran's dispute as to the reasonableness of fees. It also appears that the veteran's widow disputed the issue of reasonableness in a timely manner relative to the notice provided to her. Therefore, it appears VA should issue a decision regarding the reasonableness of the veteran's former attorney's request for fees.


Leigh A. Bradley