

Date: December 21, 1993

O.G.C. Precedent 12-93

From: General Counsel (022)

Subj: Request for Opinion: Payment of attorney fees from past-due benefits when veteran's indebtedness to the United States exceeds total amount of past-due benefits.

To: Deputy Under Secretary for Benefits (212B)

QUESTION PRESENTED:

Pursuant to the opinion of the Court of Veterans Appeals (CVA) in In the Matter of the Fee Agreement of William G. Smith in Case Number 91-488 et al., 4 Vet. App. 487 (1990) appeal docketed, No. 94-7017 (Fed. Cir. Nov. 9, 1993) [hereinafter Matter of Smith], is the Department of Veterans Affairs (VA) required to pay 20 percent of a claimant's past-due benefit award directly to an attorney in accordance with an attorney fee agreement when the claimant would not be entitled to payment of any portion of the past-due benefit award because his outstanding indebtedness to the United States exceeded the amount of the past-due benefits award?

COMMENTS:

1. When a person entitled to receive VA benefits is indebted to the United States as the result of his or her participation in a VA benefits program, the Secretary is required by statute to recover such debt by deducting the amount owed to the United States from "future payments made to such person under any law administered by the Secretary." 38 U.S.C. § 5314(a). This recovery is subject to the provisions of section 5314(b) providing that such persons be given notice of the proposed deduction and of their rights to dispute the existence or amount of indebtedness and to seek waiver of the indebtedness. Section 5314(d) directs the Secretary to prescribe regulations for the administration of this offset procedure.

2. Pursuant to section 5314(d), the Secretary has prescribed regulations in 38 C.F.R. §§ 1.911 and 1.912a governing VA collection of debts by offset from VA benefit payments. Those regulations provide that offset will be made from all current and future payments once the debtor has been provided written notice of VA's intended actions

and his or her rights, and once VA has made an initial adverse determination on any challenge or request for waiver filed by the debtor. 38 C.F.R. §§ 1.911(c), (d), and 1.912a. The claims file here indicates that VA has previously granted the veteran a partial waiver of his debt to the United States resulting from his participation in VA's loan guaranty program, but has denied waiver with respect to the remainder of the debt. His current outstanding indebtedness of \$8,041.10 exceeds the total amount of past-due benefits awarded pursuant to a May 17, 1993, regional office decision awarding an increase in his service-connected disability rating. For purposes of this opinion, we will assume that the debtor has been given the written notice required by section 1.911 and 1.912a, or that offset against his current benefits is otherwise proper.

3. Pursuant to 38 U.S.C. § 5904(d), a VA claimant and his or her attorney representative may enter into a fee agreement calling for direct payment of the fee to the attorney by VA out of any past-due benefits awarded on the claim, provided that the fee is contingent upon the favorable resolution of the claim and the fee does not exceed 20 percent of the past-due benefits awarded. When those circumstances are present, VA is authorized to withhold a portion of any past-due benefits awarded to the claimant and to pay them directly to the attorney in accordance with the following provisions in section 5904(d) (3) :

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 agreement described in paragraph (1) of this subsection 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.

4. In 38 C.F.R. § 20.609(h) (1), the Secretary has established the circumstances under which such direct-payment fee agreements will be honored. That regulation states, in pertinent part:

Such an agreement will be honored by the Department only if the following conditions are met:

- (i) the total fee payable (excluding expenses) does not exceed 20 percent of the total amount of the past-due benefits awarded,
- (ii) the amount of the fee is contingent on whether or not the claim is resolved in a manner favorable to the claimant or appellant, and
- (iii) the award of past-due benefits results in a cash payment to a claimant or an appellant from which the fee may be deducted. (An award of past-due benefits will not always result in a cash payment to a claimant or an appellant. For example, no cash payment will be made to military retirees unless there is a corresponding waiver of retirement pay. (See 38 U.S.C. 5304(a) and § 3.750 et seq. of this chapter.))

Further, 38 C.F.R. § 20.609(h)(3) defines "past-due benefits", as relevant here, as "the lump sum payment which represents the total amount of recurring cash payments which accrued between the effective date of the award, as determined by applicable laws and regulations, and the date of the grant of the benefit by the agency of original jurisdiction, the Board of Veterans' Appeals, or an appellate court."

5. In the present case, the award of past-due benefits to the claimant does not result in a cash payment to the claimant. Rather, because the amount of the veteran's indebtedness to the United States exceeds the amount of the past-due benefits, the Secretary is required by section 5314(a) to withhold the entire amount of past-due benefits to offset the veteran's indebtedness to the United States. Therefore, pursuant to section 20.609(h)(1)(iii), because the award of past-due benefits did not result in a cash payment to the veteran, no attorney fees may be paid directly by VA to the attorney under the fee agreement.

6. We do not believe that the CVA's opinion in Matter of Smith compels a different result. In that opinion, the CVA held that when a fee agreement calling for direct payment by VA satisfies the requirements of section 5904(d), "the Secretary is under a legal duty to comply with [the] fee agreement and has no discretion to refuse to comply". The CVA further held that "a necessary corollary" of the Secretary's mandatory payment obligation under § 5904(d)(3) "is that § 5904(d) vests in the attorney a corresponding right to receive payment out of past-due benefits." Matter of Smith, at 495. The CVA explained:

Where a claimant and an attorney have entered into a § 5904(d) contingency fee agreement, the claimant and attorney share a joint entitlement to the fund of any past-due benefits awarded with the exact amount of each's entitlement governed by the fee agreement. For example, where a § 5904(d) fee agreement calls for a fee of 20% of any past-due benefits awarded, and such benefits are awarded, the claimant's *entitlement* consists of 80% of the fund and the attorney's *entitlement* consists of 20% of the fund. The statutory right cannot be separated from the statutory duty: just as 38 U.S.C.A. § 5904(d) creates both entitlements, so does it impose a duty upon the Secretary to pay both entitlements. If the VA erred, for whatever reason, and mistakenly paid the entire fund to the claimant, the attorney still would be *entitled* to direct payment by the Secretary of the agreed-upon percentage of the past-due benefits awarded. Section 5904(d) does not establish an order of priorities for entitlements or claimants.

Ibid (emphasis in original).

7. The question presented with respect to the impact of the Matter of Smith opinion on the present case is whether the CVA's conclusion that an attorney is statutorily entitled to direct payment of 20 percent of past-due benefits when the fee agreement satisfies the requirements of § 5904(d) effectively precludes the Secretary from implementing section 20.609(h)(1)(iii) when the award of past-due benefits does not result in any cash payment to the claimant. We conclude

that the CVA's opinion does not preclude the implementation of section 20.609(h)(1)(iii).

8. In Aronson v. Derwinski, 3 Vet. App. 162 (1992) (per curiam order), the CVA quoted the provisions of section 20.609(h)(1) set forth above, including paragraph (h)(1)(iii), and stated:

These regulations were promulgated pursuant to the authority of, inter alia, 38 U.S.C. § 5904. Thus, the Secretary has acknowledged his obligation with regard to payment of attorney fees from past due benefits and, by doing so, has eliminated the discretionary element and the need to rely on "common law contract principles to honor the assignment." *Matter of Smith [in Case Number 90-58]*, 1 Vet.App. 492, 505 (1991) (Steinberg, J., concurring).

In consideration of the foregoing, the Court finds that the fee agreement in this case meets the conditions set forth at 38 C.F.R. § 20.609(h)

. . . .

Aronson, 3 Vet. App. at 164. Similarly, in Matter of Smith, the CVA again quoted the provisions of 38 C.F.R. § 20.609(h)(1), including paragraph (h)(1)(iii), and stated: "The regulation sets forth three conditions which must be met for such direct payment by the VA to the attorney If these conditions are satisfied, the '[fee] agreement will be honored by the Department' 38 C.F.R. § 20.609(h)(1)." 4 Vet. App. at 492. Further, in discussing its Aronson opinion, the CVA in Matter of Smith stated: "[T]he Court concluded [in Aronson] that, in adopting 38 C.F.R. § 20.609(h)(i), (ii), (iii), the 'Secretary has acknowledged his obligation with regard to payment of attorney fees from past due benefits'" 4 Vet. App. at 494. Because the CVA in Aronson and in Matter of Smith cited with apparent approval the regulatory requirements of section 20.609(h)(1), including paragraph (h)(1)(iii), there is no reason to believe that Matter of Smith would preclude VA from implementing the provisions of section 20.609(h)(1)(iii).

9. In Matter of Smith, the CVA held that an attorney who is a party to a valid § 5904(d) fee agreement has a statutory

entitlement to a percentage, not to exceed 20 percent, of the "fund" of past-due benefits, which VA is obligated to pay to the attorney directly. 4 Vet. App. at 495. However, in a case, such as this one, where the veteran's indebtedness to the United States exceeds the amount of past-due benefits awarded, no such "fund" of past-due benefits is created because, by operation of 38 U.S.C. § 5314(a), the award of past-due benefits is offset by the veteran's preexisting indebtedness. Stated differently, where an award of past-due benefits does not, by operation of law, result in a "cash payment to a claimant or an appellant from which the fee may be deducted" (§ 20.609(h)(1)(iii)), there is no "fund" of past-due benefits to which an attorney may be entitled. Therefore, the provisions of section 20.609(h)(1)(iii) and the CVA's citation of those provisions in Matter of Smith, are consistent with the holding in Matter of Smith, that the Secretary is obligated to honor an attorney's entitlement under a section 5904(d) fee agreement to a percentage of the "fund" of past-due benefits.

10. Further, a section 5904(d)(3) fee agreement is in the nature of an assignment of the veteran's right to receive the portion of past-due benefits covered by the fee agreement. The CVA in Matter of Smith held that section 5904(d)(3) "was specifically intended . . . to permit the Secretary to honor a [claimant's] assignment of a portion of past-due benefits, despite the statutory prohibition of the assignment of veterans benefits payments" in 38 U.S.C. § 5301(a). 4 Vet. App. at 494; see also 134 Cong. Rec. at 31,469 (1988) (Statement of Senator Cranston) (statutory provision for attorney fees paid directly by VA from past-due benefits "would be an exception to section [5301] of title 38 which prohibits a veteran from assigning the rights to his or her benefits"). As a general rule, "an assignee stands in the shoes of his assignor, deriving the same but no greater rights and remedies than the assignor then possessed." Fox-Greenwald Sheet Metal Co. v. Markowitz Bros., Inc., 452 F.2d 1346, 1357 n.69 (D.C. Cir. 1971); see also, e.g., Florida Bahamas Lines, Ltd., v. The Steel Barge "Star 800" of Nassau, 433 F.2d 1243, 1246 (5th Cir. 1970); In Re Trans-United Industries, Inc., 351 F.2d 605 (2d Cir. 1965). Thus, an assignee's right to payment pursuant to an assignment is the same as the assignor's right, and is subject to any offsets which the debtor could have exercised against the assignor. See United States v. Thompson &

Georgeson, Inc., 346 F.2d 865, 869 (9th Cir. 1965); Ozanic v. United States, 188 F.2d 228, 231 (2d Cir. 1951). With respect to the present claim, VA is statutorily required under section 5314(a) to withhold payment to the veteran of past-due benefits, in order to offset the veteran's outstanding debt to the United States. The above cases, therefore, suggest that, because the veteran (assignor) had no right to receive payment of any part of the past-due benefits, the attorney (assignee) could not have obtained such a right by assignment from the veteran.

HELD:

The provisions of 38 U.S.C. § 5314(a) require VA to apply the entire amount of the past-due benefits award to offset the veteran's outstanding debt to the United States. Therefore, no fund of past-due benefits payable to the veteran was created, and the veteran's attorney could not, by assignment under 38 U.S.C. § 5904(d), obtain a right to direct VA payment of attorney fees from the past-due benefits award.

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