



DEPARTMENT OF VETERANS AFFAIRS
Office of the General Counsel
Washington DC 20420

May 24, 2004

In Reply Refer To: 022

The Honorable Lane Evans
Ranking Democratic Member
Committee on Veterans' Affairs
U.S. House of Representatives
Washington, DC 20515

Dear Congressman Evans:

I am responding to your April 7, 2004, letter to the Secretary of Veterans Affairs, which asks for our interpretation of 38 U.S.C. § 5904 governing representation of veterans before the Department of Veterans Affairs (VA). Specifically, you ask whether section 5904 permits attorneys to charge veterans for consultation that occurs prior to the filing of a claim for VA benefits. We conclude that attorneys may charge veterans for pre-filing consultation without violating the attorney fees limitation contained in section 5904.

You expressed concern that the criminal penalties for violating section 5904, see 38 U.S.C. § 5905, might discourage attorneys from advising elderly and disabled veterans about their eligibility for certain Federal benefits. To illustrate your concern, you listed two examples of situations where attorneys might be unsure of their obligations under section 5904. These examples are essentially identical in that they both involve elderly veterans who obtain general legal advice concerning eligibility for Federal benefits, including VA benefits. Though not stated in your examples, we assume that services rendered by attorneys in such situations would generally include review of records, research, counseling, and any other assistance that a potential VA claimant might need short of actually preparing and presenting a specific claim for benefits. We are not aware of anything in the law governing representation of veterans that would prohibit attorneys from charging fees for this kind of pre-filing consultation.

Section 5904(a) authorizes the Secretary to "recognize any individual as an . . . attorney for the preparation, presentation, and prosecution of claims" for VA benefits. However, an attorney may not charge a fee "in connection with a proceeding before the Department . . . for . . . services provided before the date on which the Board of Veterans' Appeals first makes a final decision in the case." 38 U.S.C. § 5904(c)(1). Attorneys may charge a fee for services provided after the Board makes its first final decision only if the veteran retains the attorney within a year of the Board's decision. *Id.* Your letter suggests that the phrase "in connection with a proceeding before the Department" in section 5904(c)(1) means that, in addition to pre-filing consultation, fees may be charged for preparing and presenting a claim for VA benefits. We respectfully

2.

The Honorable Lane Evans

disagree. When read together, subsections (a) and (c)(1) of section 5904 indicate that the "preparation" and "presentation" of a claim are among the "services" that attorneys may provide to claimants "in connection with" a VA proceeding. In our view, section 5904 as a whole defines the scope of attorney services for which fees are prohibited prior to a final Board decision on the claim.

To the extent that there is any ambiguity about whether claim preparation and presentation are included in the prohibition against attorney fees, VA has resolved that ambiguity in regulations that govern representation of VA claimants. The regulations define a VA "claimant" as "a person who has filed or has expressed to a representative, agent, or attorney an intention to file a written application for determination of entitlement to benefits provided under title 38, United States Code, and implementing directives." 38 C.F.R. § 14.627(g). An attorney may be accredited to represent a veteran in connection with a claim for VA benefits upon submission of a power of attorney or signed writing on the attorney's letterhead stating that the claimant has authorized the representation. 38 C.F.R. §§ 14.629(c), 14.631(a) and (b). Accredited attorneys may charge a fee for their services "only" if the Board has promulgated a final decision on the claim and the claimant retained the attorney within one year of the Board's decision. 38 C.F.R. § 20.609(c)(1). Finally, the regulations provide that VA shall cancel an attorney's accreditation if the VA General Counsel finds that the attorney demanded or accepted "unlawful compensation for preparing, presenting, prosecuting, or advising or consulting, concerning a claim." 38 C.F.R. § 14.633(c)(3). In our view, these regulations adequately inform attorneys of their obligations under current law. Under no circumstances may attorneys charge veterans for preparing and presenting claims for VA benefits if those services are provided prior to a final Board decision on the claim.

Legislative history supports our interpretation of this statutory limitation upon attorney fees. Before 1988, the law did not prohibit the payment of nominal fees to attorneys for preparing and filing claims for VA benefits. See 38 U.S.C. § 3404(c) (1979) (authorizing maximum fees of ten dollars "for the preparation, presentation, and prosecution of claims"); 38 U.S.C. § 551 (1942) (authorizing maximum attorney fees of ten dollars "as may be required in the preparation and execution of necessary papers"). However, section 104(a) of the Veterans' Judicial Review Act (VJRA), Pub. L. No. 100-687, Div. A, § 104(a), 102 Stat. 4105, 4108 (1988), repealed the statutory ten-dollar fees afforded to attorneys for claim-preparation services and enacted the fee provisions in current section 5904. In its summary of a bill that preceded the enactment of the VJRA, the House Committee on Veterans' Affairs stated that the attorney fees provision "would prohibit attorneys from charging any fee in connection with an application for VA benefits." H.R. Rep. No. 100-963, at 5 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5782, 5786. The Committee went on to report that the primary purpose for the historical limitation of attorney fees was "to protect the interests of veterans from the perceived threat that agents or attorneys would charge excessive fees for their services, which essentially required only the preparation and presentation of an

3.

The Honorable Lane Evans

application for benefits." *Id.* at 16, *reprinted in* 1988 U.S.C.C.A.N. at 5798. Another purpose was to maintain the "informal and non-adversarial" structure of VA's claims adjudication process. *Id.* The Committee intended that the legislation would maintain that informal structure by prohibiting attorneys from charging fees for services rendered before a VA regional office issues a statement of the case concerning a challenged decision. *Id.* at 26, *reprinted in* 1988 U.S.C.C.A.N. at 5808. To remove any doubt concerning its intentions, the Committee concluded its analysis by emphasizing that the attorney fees provisions provide "explicitly that no fees may be charged for any services rendered prior to the issuance of the statement of the case." *Id.* at 29, *reprinted in* 1988 U.S.C.C.A.N. at 5811. Prior to enactment of the VJRA, the Senate and House Committees on Veterans' Affairs entered into a compromise agreement, which expanded the fee limitation to include all services rendered prior to the first final Board decision on a claim. See Explanatory Statement on Compromise Agreement on Division A, 134 CONG. REC. S16650 (daily ed. Oct. 18, 1988), *reprinted in* 1988 U.S.C.C.A.N. 5834, 5836-38. See also *In re Smith*, 1 Vet. App. 492, 496-511 (1991) (Steinberg J. concurring) (analyzing the legislative history of the VJRA attorney fees provisions).

The attorney in your first example is distinguished only by the fact that he "assists the veteran in completing an application for pension." To the extent that, after consultation, the veteran expressed to the attorney an intention to file a specific claim for VA benefits and the attorney charged the veteran for preparing the claim, the attorney did so in violation of section 5904. For that attorney, the better practice would have been to charge the veteran for the pre-filing consultation and simply prepare the claim on a *pro bono* basis.

I hope this information is helpful to you. Please let me know if I can be of further assistance.

Sincerely yours,



Tim S. McClain
General Counsel