

VETERANS ADMINISTRATION (VA) FINAL (or rather finally) PUBLISHES REGS. for REPRESENTATION

by Arlene Kane

On May 22, 2008 the Veteran's Administration published final regulations permitting "accredited" attorneys to represent veterans for a fee. Both attorneys and non attorneys who establish "accredited" status, (discussion below) will be permitted to represent veterans/claimants, file a fee petition and procure a fee, in a similar manner presently provided for in SSA claims. 73Fed. Reg. 29852 (May 22, 2008).

A BIT OF HISTORY

If you are thinking that the cost of fuel has risen in your lifetime, how about this? The last regulated fee for attorneys representing veterans was \$5.00 ! This legislation was enacted post Civil War and was increased years later to \$10.00. It was not until 1988 that Congress passed legislation *prohibiting* attorneys from representing veterans during the claims process and thereby eliminating all fees. The U.S. Court of Appeals for Veterans Claims (CAVC) was created and the rationale for prohibiting "outside" assistance was that CAVC provided the veterans/claimants with a vehicle to pursue claims denied at the VA Regional Office (VARO) level.

Unfortunately, the vast numbers of claims are denied, as veterans/claimants are rarely aware of the process, laws and abundance of medical evidence necessary to meet the very stringent burden of proof required by the Department of Veterans Affairs (VA). Counsel is usually a local county service officer along with the VARO to coordinate the claim and represent the veteran before the VA. Although, the review process is intended to be non-adversarial, absent a zealous advocate these cases rarely culminate in a successful outcome and all too often are abandoned by the claimant. If there is an appeal to the Board of Veterans' Appeals (BVA), adjudicators frequently do not afford claimants all of the assistance required by law. All too frequently the adjudicators erroneously deny otherwise meritorious claims, based on a finding of insufficient or incomplete evidence. Those veterans that do get to the Appeals level, (CAVA) and are denied on appeal find themselves facing an even greater challenge at the U.S. Court of Appeals of Veterans Claims level. As the decision below is given substantial weight, the chances of the veteran prevailing are diminutive.

ESTABLISHING DISABILITY

In order for the veteran to prevail in a disability claim there must be a finding that the onset of the illness or disability is "coincident" to a period of time when the veteran was in military service. The disability need not have occurred during a time of war. As the amount of the benefits correlate to the veteran's earning capabilities they can vary greatly. The amount of benefits awarded are dependent on the severity of the illness or injury which is rated on a scale from 0 – 100. Experienced advocacy can make a tremendous difference in the final rating and therein the amount of compensation awarded. Monthly compensation can range from a few hundred to a few thousand dollars. Causation is not a factor in determining benefits nor need it be established.

Special Monthly Compensation (SMC), monies paid in addition to regular disability compensation, may be available to a veteran who *as a result of military service* incurred the loss of specific organs or extremities. There are also higher rates for combinations of these losses (for purposes of this article a more detailed explanation shall not be included). Herein again, good advocacy can make a great difference in the final award.

PROCEDURE FOR ATTORNEY REPRESENTATION and COMPENSATION

An attorney or non-attorney may become an accredited representative of a veteran/claimant if they are of good character and fitness and have not been disbarred or suspended from practice from any court or agency. The individual representative must complete and file/submit **VA Form 21a**, "Application for Accreditation as a Claims Agent or Attorney", with the VA General Counsel. An attorney must provide self-certification of admission information concerning practice before any court, bar or state or Federal Agency. The fact that the attorney is of good character will be presumed for the attorney in good standing based on State bar membership unless the Attorney General receives credible information to the contrary. Additionally, the agent or attorney must complete 3 hours of qualifying CLE credits on veterans' benefits law and procedure. The original regulation allowed for a twelve-month period from the date of filing for the attorney to become accredited, (as of this writing I have learned that that grace period has been eliminated). The attorney or agent must also complete an additional 3 hours of CLE credits within 3 years of the initial accreditation in order to maintain accredited status, and again every (2) two years thereafter. The CLE courses must be approved for at least (3) three hours by the State bar association of any State. Agents or attorneys are required to furnish to the VA as part of the annual certification, certification of completion of the CLE requirement. 38 C.F.R. §14.629(b)(4). Although there

A VA Form 21-22a "Appointment of Attorney or Agent as Claimant's Representative", signed by the Veteran, his parent or legal guardian, must be filed with the Department, appointing an accredited attorney or agent to advocate on behalf of the veteran/claimant in a particular claim. Compliance with all filings authorizes the VA to disclose any information to the "accredited" attorney or appointed representative, as well as to allow that representative to advocate on behalf of the veteran before the Department. The veteran/claimant can discharge the attorney from serving as representative at any time.

For all other agents or representatives a power of attorney, executed on a VA 21-22 "Appointment of Veterans Service Organization as a Claimant's Representative" signed by the Veteran, his parent or legal guardian, must be filed with the Department. A power of attorney can be revoked at any time. A new power of attorney constitutes a revocation of any existing power of attorney. 38 C.F.R. §14.631

FEES and FEE AGREEMENTS

"Accredited" attorneys and agents may receive fees for their services on behalf of the veteran/claimant, only after both a favorable decision and the appropriate filing of fee agreements and other forms required by the Department have been submitted. Fee agreements must be limited to 20% of the benefits due and owing to the veteran/claimant or said fee, *will not be withheld* by the Department for direct payment to the attorney or

agent. 38 C.F.R. §14.636(g). The elements that must be present for a fee agreement to be valid are set forth in 38C.F.R. §14.636(g) as follows: (1) the name of the veteran or the claimant if other than the veteran; (2) the name of any disinterested third party payer and the relationship between the payer and the claimant or appellant; (3) the file number assigned to the claim; (4) the exact terms and conditions for determining fees.

Fees must be conditioned on a meritorious outcome for the veteran as claimant/appellant and a past-due benefit must be due and owed to the claimant. Past due benefits are defined as “ a nonrecurring payment resulting from a benefit, or benefits, granted on appeal or awarded on the basis of a claim reopened after a denial by a VA agency of original jurisdiction or the Board of Veteran’s Appeals or the lump sum payment that represents the total amount of recurring cash payments that accrued between the effective date of the award and the date of the grant of benefits.” 38 C.F.R. §14.636(h)(3).

An attorney and veteran as claimant/appellant may execute and submit a fee agreement that is paid directly by the veteran to their representative and which is not withheld by the department for direct payment to the representative. These agreements may provide for an amount greater than the 20% to be paid by the veteran claimant/appellant. This is not a “direct-pay fee agreement”.

The attorney must within 30 days of the execution of the fee agreement: file a copy of the agreement with the Office of General Counsel (022D), 810 Vermont Avenue NW, Washington DC 20420, and notify the office of original jurisdiction of the existence of the agreement and provide that office with a copy of the fee agreement.

Additionally, the VA charges 5% *of the fee* for processing the claim. The 5% fee is capped at \$100.00.

It would be prudent for an attorney or agent to obtain a signed agreement for the reimbursement of expenses incurred in connection with the claim. Expenses incurred in connection with the prosecution of the claim may be reimbursed from the client. Expenses are not considered fees and the VA will not pay or withhold the expenses on behalf of the attorney/agent.

FEE APPROVAL

Fees will be approved only if they are deemed “reasonable”. Reasonableness can be based on a fixed fee, a percentage of past-due benefits, or fees fixed at 20% of past-due benefits. Fees in excess of 1/3 of past-due benefits will be deemed excessive and thereby “unreasonable”. This presumption can be rebutted upon a showing of excessive hours or any extraordinary complexities involved in the case, the level of competence and skill required of the representative, the results achieved (this includes benefits amount), the stage of the case when the attorney was retained and whether and to what extent the services were contingent on the outcome. 38 C.F.R. § 14.636(e)(f).

Fees may be appealed by the veteran as claimant/appellant or by the VA on its own motion or on motion on behalf of a claimant/appellant. If the fee agreement is capped at 20% the VA Office of General Counsel must establish by a preponderance of the

evidence or by clear and convincing evidence that the fee was unreasonable before the fee is reduced. 38 C.F.R. § 14.636(i).

CONCLUSION

The new regulations represent a great opportunity for both veterans and attorneys. Absent the opportunity for their representatives to obtain fees, veterans encountered great hardships advocating on their own behalf, in spite of agency representation. Although the enactment of Federal Regulation for the payment of fees for representatives is a long overdue milestone for veterans and attorneys alike, it is not without flaws. Payment of fees is limited to those representatives who become accredited and for representation only *after* a “Notice of Disagreement” has been filed (similar to requesting reconsideration in a SSA claim). This makes the challenge of good advocacy much more arduous. The opportunity to properly advocate for the clamant is at the initial stage of developing the case. At the onset of a case the accredited advocate has the best opportunity to develop and analyze the evidence before it is presented for review. Additionally, seeking to overturn an unfavorable initial review is an onerous task in itself. The best outcome for the veterans/ claimants is an expeditious one at the earliest stage of review.

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