BOARD OF VETERANS' APPEALS
DEPARTMENT OF VETERANS AFFAIRS
WASHINGTON, DC 20420

IN THE APPEAL OF
CATHERINE CORNELL

IN THE CASE OF
BOBBY S. MOBERLY

DOCKET NO. 14-33 184) DATE APRIL 27, 2015
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On appeal from the
Department of Veterans Affairs Regional Office in St. Louis, Missouri

THE ISSUE

Whether the Department of Veterans Affairs (VA) payment of $20,204.16 to the appellant as attorney fees on July 23, 2012 was proper.

REPRESENTATION

Appellant represented by: Kenneth M. Carpenter, Attorney at Law

ATTORNEY FOR THE BOARD

Debbie A. Breitbeil, Counsel

IN THE APPEAL OF
CATHERINE CORNELL

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INTRODUCTION

The Veteran served on active duty from January 1952 to December 1953, and the appellant is his former accredited attorney representative in a matter that had previously been appealed to the Board of Veterans' Appeals (Board). This case comes to the Board on appeal of a February 2013 administrative decision of the VA Regional Office (RO) in St. Louis, Missouri, which determined that the appellant was not eligible for the payment of attorney fees of $20,204.16 on July 23, 2012 because she was no longer the Veteran's representative before VA. The appellant appealed this determination, asserting in part that the payment she received was correct.

FINDINGS OF FACT

1. The Veteran in November 2010 appointed the appellant as his representative before VA for the express limited purpose of "obtaining compensation for bilateral hearing loss and tinnitus"; he entered into an attorney fee agreement with her in regard to that representation.

2. In August 2011, after claims of service connection for hearing loss and tinnitus were remanded by the Court upon its grant of a Joint Motion for Remand, the Board granted the claims of service connection for hearing loss and tinnitus; in an August 2011 rating decision, the RO effectuated the award and assigned disability ratings of 80 percent and 10 percent, respectively, effective January 3, 2006.

3. In October 2011, the RO issued the appellant a payment of $18,208.81 as attorney fees, on the basis of the award of past-due benefits that resulted in a cash payment to the Veteran from the August 2011 rating action.

4. In a November 2, 2011 letter, the appellant notified the Veteran that she was withdrawing her representation of him, informing him that there was nothing more that she could do for him on his claim.

5. In late November 2011, the Veteran submitted VA Form 21-22, in which he appointed DAV as his accredited representative before VA.

6. In January 2012, DAV assisted the Veteran in filing a claim for TDIU; in a May 2012 rating decision, the RO granted the TDIU claim, effective January 3, 2006.

7. On July 23, 2012, the RO issued the appellant payment in the amount of $20,204.16 as attorney fees in relation to the award of TDIU; on July 31, 2012, the Veteran notified the RO by statement, dated May 11, 2012, that the payment of attorney fees to the appellant was improper because she no longer represented him.

8. In letters in December 2012 and January 2013, the RO informed the appellant that it had erred in the disbursement of funds to her in July 2012, finding that she was not eligible for the payment of attorney fees of $20,204.16 issued on July 23, 2012.

CONCLUSION OF LAW

VA payment of $20,204.16 to the appellant as attorney fees on July 23, 2012 was improper. 38 U.S.C.A. § 5904 (West 2014); 38 C.F.R. § 14.636 (2014).

REASONS AND BASES FOR FINDINGS AND CONCLUSION

Duties to Assist and Notify

As provided for by the Veterans Claims Assistance Act of 2000 (VCAA), VA has a duty to notify and assist claimants in substantiating a claim for VA benefits. 38 U.S.C.A. §§ 5100 , 5102, 5103, 5103A, 5107, 5126 (West 2014); 38 C.F.R. §§ 3.102, 3.156(a), 3.159, and 3.326(a) (2014).

However, an attorney fee dispute is not a "claim" for disability compensation benefits. The Court has held that VA's duties to notify and assist do not apply to cases where, as here, the applicant is not seeking benefits under Chapter 51 of Title 38 of the United States Code, but rather is seeking a decision regarding how benefits will be distributed under another Chapter (*i.e.*, Chapter 59). *See Sims v. Nicholson*, 19 Vet. App. 453, 456 (2006). Nevertheless, the appellant has been afforded appropriate notice and assistance. She was provided a statement of the case (SOC) in September 2014, which advised her of the reasons and bases for the RO's decision and provided her with the full text of the appropriate regulations. The appellant was afforded an appropriate opportunity to respond before the case was presented to the Board for adjudication. The appellant is an attorney who represents veterans in their own appeals before VA, and she herself is presently represented by an attorney; both are presumed knowledgeable of the applicable laws and regulations and of the right to testify at a hearing, but she did not request a hearing. In sum, the Board finds that no further action is necessary here under VA's duties to notify and assist.

Factual Background

The RO in a May 2006 rating decision denied the Veteran's claims of service connection for bilateral hearing loss and tinnitus. He appealed the decision to the

Board. In June 2006, he appointed Disabled American Veterans (DAV) as his accredited representative before VA.

In an August 2009 decision, the Board denied the claims of service connection for bilateral hearing loss and tinnitus, and the Veteran appealed the decision to the U.S. Court of Appeals for Veterans Claims (Court). The appellant, on behalf of the Veteran, entered into a Joint Motion for Remand with the Secretary of VA, which the Court granted in October 2010, vacating the Board's August 2009 decision and remanding the matters to the Board for further review.

In November 2010 (and later, in September 2011), VA received VA Form 21-22a, in which the Veteran had appointed the appellant as his representative for the express limited purpose of "obtaining compensation for bilateral hearing loss and tinnitus." Submitted with the form was a contract, signed in October 2010, showing that the Veteran and appellant had entered into an attorney fee agreement with regard representation involving the hearing loss and tinnitus matters. An amended fee agreement was received in November 2010, to correct a typographical error in the former agreement.

While on remand, the Board in an August 2011 decision granted the claims of service connection for hearing loss and tinnitus. Thereafter, the RO in an August 2011 rating decision implemented the Board's decision, awarding service connection for bilateral hearing loss and tinnitus and assigned ratings of 80 percent and 10 percent, respectively (with a combined rating of 80 percent), effective January 3, 2006 (date of receipt of the claims for service connection). Neither the Board's decision nor the RO's rating decision mentioned the issue of a total disability rating due to individual unemployability based on service-connected disability (TDIU), but the RO's rating codesheet notes that while the Veteran meets the schedular requirements for TDIU, there was no evidence to show that he was unable to work due to his disabilities. The RO's rating decision resulted in a substantial award of retroactive benefits. On the basis of the award of past-due

benefits that resulted in a cash payment to the Veteran, the RO issued the appellant a payment of $18,208.81 as attorney fees in October 2011.

In a letter dated November 2, 2011, the appellant notified the Veteran that her representation of him was effectively ended. Specifically, she stated that she had "closed [his] file at [her] office because at this time, there is no further work to be done on your claim… [i]t was a pleasure working with you."

Subsequently, in November 2011 the RO received a VA Form 21-22, in which the Veteran again appointed DAV as his accredited representative before VA.

In January 2012, the Veteran through his representative, DAV, filed a claim for TDIU, claiming that his service-connected hearing loss prevented him from obtaining gainful employment. The RO granted the TDIU claim in a May 2012 rating decision, effective January 3, 2006 (the same date service connection was established for bilateral hearing loss and tinnitus). The RO sent a letter to the appellant in May 2012, notifying her that an amount was withheld from the TDIU award for the possible payment of attorney fees. A copy of the RO's letter was sent to the Veteran, but no copy was sent to his representative of record, DAV. There was no reply to this letter from either the appellant or Veteran.

On July 23, 2012, the RO issued the appellant payment in the amount of $20,204.16 as attorney fees. On July 31, 2012, the RO received a statement, dated May 11, 2012, from the Veteran through his representative, DAV, wherein he objects to the payment of attorney fees to the appellant. He argued that she no longer represented him. He cited to the November 2011 letter she sent to him, informing him that she had closed his case, and related that he then went and appointed DAV as his representative. He felt the appellant was already compensated for the work she performed on his appeal.

In a December 2012 letter, the RO informed the appellant that it had erred in the disbursement of funds to her. The RO stated that it was an oversight that it had granted her an attorney fee payment of $20,204.16, to which she was not entitled, and that it was "up to [her] to settle the debt with the veteran." In a January 2013 statement, the appellant through her attorney representative disagreed with the RO's determination. It was argued that the RO's demand to "settle the debt with the veteran" was *ultra vires*, as there was no statutory or regulatory authority to make such a demand. It was asserted that the appellant had a valid fee agreement with the Veteran for the withholding and payment of her fees, and that VA reviewed that fee agreement and paid the appellant accordingly. It was further asserted that the RO had not cited to any statutory or regulatory provisions in regard to its "oversight" in making the payment to the appellant.

The RO did not accept the appellant's January 2013 statement as a notice of disagreement because a decision of denial (with notification of appellate rights) had not been issued. Thereafter, by letter in February 2013, the RO notified the appellant of its determination that she was not eligible for the payment of attorney fees of $20,204.16 issued on July 23, 2012, because she was no longer the Veteran's representative before VA. She appealed the determination in February 2013, reiterating previous arguments and asserting in part that the TDIU claim was reasonably raised by the evidence of record as part of the underlying claims of service connection for hearing loss and tinnitus, for which the appellant successfully represented the Veteran, and that she was therefore entitled to the fee based on the award of TDIU. In a September 2014 substantive appeal statement, it was argued essentially that the RO had "unlawfully created a debt and has sought repayment of an attorney fee correctly paid by VA to the appellant in accordance with the law."

In an October 2014 statement, the Veteran requested that VA "promptly release and pay directly to me, without further delay, the benefit funds in the amount of $20,204.16." He agreed with the RO in its statement of the case that attorney fees were erroneously paid to the appellant on or about July 23, 2012. He stated that the

appellant, who had closed his file, later contacted him and his wife to inquire "what was going on" in relation to receiving the second payment of fees, and had wanted to send him paperwork for him to sign in order "to get her back on [the] case." He felt that he should not be penalized by waiting years to receive funds to which he was entitled after VA's error, and that the matter was between VA and the third party.

Legal Criteria and Analysis

The relevant legal authority provides that a claimant may have attorney representation for the prosecution of claims for VA benefits. 38 U.S.C.A. § 5904(a) (West 2014). Pursuant to the Veterans Benefits, Health Care, and Information Technology Act of 2006 (P.L. 109-461), the statute governing the circumstances under which attorney fees may be charged was amended. The amended statute permits attorneys-at-law and agents to charge fees for representation after an agency of original jurisdiction has issued a decision on a claim or claims, and an NOD has been filed with respect to that decision on or after June 20, 2007. In May 2008, VA revised and renumbered the regulatory provisions governing attorney fee agreements and payment of attorney fees out of past-due VA disability compensation benefits. *See* 73 Fed. Reg. 29875 (May 22, 2008) codified at 38 C.F.R. §§ 14.636 , 14.637 (2014). The revised regulations generally are applicable to cases where an NOD is filed with respect to a challenged VA decision on, or after, June 20, 2007. *Id.*

In the veterans' benefits claims system, there are two separate issues for determination regarding attorney fee awards: initial eligibility for a fee award and reasonableness of the fee award. *See Scates v. Principi*, 282 F.3d 1362, 1367 (Fed. Cir. 2002) (noting, however, that the line between entitlement and reasonableness of attorney fees may not be "clear and bright"). Initial eligibility, which is at the root of the claim on appeal, is governed by 38 U.S.C.A. § 5904 and 38 C.F.R. § 14.636.

When a claimant and an agent or attorney have entered into a fee agreement under which the total amount of the fee payable to the agent or attorney (i) is to be paid to the agent or attorney by the Secretary directly from any past-due benefits awarded on the basis of the claim, and (ii) is contingent on whether or not the matter is resolved in a manner favorable to the claimant, the total fee payable to the agent or attorney may not exceed 20 percent of the total amount of any past-due benefits awarded on the basis of the claim. A claim shall be considered to have been resolved in a manner favorable to the claimant if all or any part of the relief sought is granted. 38 U.S.C.A. § 5904(d); 38 C.F.R. § 14.636(h)(1). Such award of past-due benefits must result in a cash payment to a claimant or an appellant from which the fee may be deducted. 38 C.F.R. § 14.636(h)(1)(iii).

As explained in the factual background above, the appellant received fees of $18,208.81, for her successful representation of the Veteran in the matters of two service connection claims (bilateral hearing loss and tinnitus), where an award of past-due benefits resulted in a cash payment to the Veteran. There is no dispute over the payment of attorney fees in that matter. The dispute in this case arose with regard to the payment of additional attorney fees in the subsequent matter of an award of TDIU, the claim for which had been filed by a newly appointed representative of the Veteran. The Veteran appointed a new representative in November 2011 because the appellant, in no uncertain terms, had informed him that her representation of him in his case before VA was being withdrawn. In other words, there was no fee agreement in effect with the appellant at the time of the filing and award of TDIU, and the record does not show that the appellant prosecuted the TDIU before VA.

Thus, in accordance with statutory and regulatory provisions, there was no attorney fee authorized to be paid out to the appellant in July 2012 because her representation of the Veteran had clearly and unmistakably ended in the previous year, months before the TDIU claim was even filed by DAV. In her November 2011 letter to the Veteran, the appellant spelled it out – she considered their

attorney-client relationship had ended and she closed her files because she did not see that there was anything more that she could do to assist the Veteran. At such time, her representation of the Veteran was terminated and there was no fee agreement shown to be in effect past such date. For her to subsequently lay claim to the $20,204.16 in fees that were paid out in July 2012 from an award arising from a claim filed by a subsequently appointed representative, after she parted ways with the Veteran, is unconscionable and amounts to a windfall she neither earned nor was entitled. It has further not escaped notice that in her representation of the Veteran in his original claims of service connection for hearing loss and tinnitus, she advanced no arguments relating to how such disabilities affected the Veteran's employability. After he was awarded disability compensation for the disabilities that were assigned a combined 80 percent rating, which enabled him to meet the schedular requirements for a TDIU, she still did not raise or prosecute a claim for TDIU. Rather, after receiving the initial fee payment from VA, she wrote to the Veteran to terminate her representation. Yet, in this appeal she believes she is entitled to retain a substantial fee arising from an award of TDIU that was made only after another duly appointed representative filed a claim for such compensation. As previously noted, that claim was filed a couple months after the appellant conveyed to the Veteran in her letter of November 2011 that there was "no further work to be done" on his claim! The appellant was eligible for and received attorney fees in regard to the award for compensation for hearing loss and tinnitus, but she is not eligible for and should not have accepted payment of attorney fees in regard to the award of TDIU that was claimed and adjudicated after her limited representation of the Veteran had ended. It is troubling that there is no evidence to show that the appellant ever inquired of the VA as to the reason she was receiving a second attorney fee payment – which is even larger than the first considerable payment – for an award of disability compensation on a matter she neither raised nor prosecuted before the VA.

This case has largely been handled by the RO as if it was a contested claim, adhering to most of the procedures that must be followed in such claims.

See 38 U.S.C.A. § 7105A and 38 C.F.R. §§ 19.100-02 and 20.500-04. The Board, however, views this claim to be of a different, and simpler, construct. In the attorney fee withholding context, a contested claim involves two parties: a claimant, who has been awarded VA benefits, and his or her representative, who seeks a percentage of the claimant's "past-due benefits" as a fee for legal services. *See Mason v. Shinseki*, 743 F.3d 1370, 1371 (Fed. Cir. 2014) (noting that, under 38 U.S.C.A. § 5904(d), VA may directly pay reasonable legal fees to the attorney from any past-due benefits awarded to the veteran). The claim is considered contested when VA denies an attorney's request for fees and the attorney disputes the denial of his or her request. In the case at hand, the percentage of past-due benefits of the Veteran's TDIU award as a legal fee to be paid to the appellant is not at issue. This case is merely one in which the RO has made an erroneous fee payment to a former attorney representative in July 2012, not realizing that the attorney was no longer the representative of record until the Veteran called that fact to its attention. Indeed, it appears the RO simply overlooked the VA Form 21-22, which it had earlier acknowledged and filed in the record in November 2011. After recognizing its mistake, the RO in its December 2012 and January 2013 letters to the appellant has attempted to rectify its error. Understandably, the Veteran wishes to recover the erroneous payment, which the Board deems is solely the result of VA error given that the payment was made to an attorney who did not represent the Veteran on the TDIU matter. The onus is not on him to contest the matter. As this case does not involve a contested claim *per se*, the various procedures that must be followed in such cases are not required here. This includes providing the appellant with a copy of the Veteran's "notice of disagreement" in July 2012 (wherein he disputes VA's payment of attorney fees of $20,204.16 to her), which she has asserted that she had not received in violation of the regulations.

The appellant through her attorney has raised particular arguments in her substantive appeal. She argued that the SOC did not address the issue appealed by her. As she sees it, the matter she is appealing involves "the unlawful debt the VA has attempted to impose" on her as created by the VA in its December 2012 and

January 2013 letters to her, and not the payment of attorney fees paid to her in July 2012 as addressed in the statement of the case. She claims that the SOC should adjudicate this matter. In citing to applicable regulations of 38 C.F.R. §§ 14.631 and 14.636, regarding powers of attorney and payment of fees for representation by attorneys before VA, the RO clearly explained the underlying reason for the "debt" attributable to the appellant by her acceptance of the attorney fee payment in July 2012. The RO found that the appellant's representation was limited to bilateral hearing loss and tinnitus, that she closed her file and terminated her relationship with the Veteran once compensation for hearing loss and tinnitus was awarded, and that she did not represent the Veteran in his claim for TDIU that was subsequently granted. Thus, the attorney fees paid to her based on the TDIU award were erroneous and she was not entitled to them. In other words, the RO addressed the matter of the validity of the "debt" and why it was attempting to recover monies it paid to her.

The appellant has also argued that a copy of the Veteran's "notice of disagreement" received in July 2012, regarding the decision to pay the appellant a fee of $20,204.16 based on VA's award of past due benefits from granting the TDIU claim, was never made available to her. She further asserts that in accordance with the law in a case involving a simultaneously contested claim, the Veteran had 60 days in which to file a notice of disagreement, and his notice in July 2012 exceeded the time limit. As earlier discussed, this case is not deemed to be a contested claims case, and therefore the procedural and due process provisions accompanying such claims are not for application.

The appellant has further argued at length that VA correctly paid her $20,204.16 based on VA's award of past due benefits to the Veteran from granting a TDIU claim containing *the same effective date in 2006* as VA's previous award of compensation for granting service connection for hearing loss and tinnitus (for which she was also paid attorney fees). In support of such argument, citations were made to *In the Matter of the Fee Agreement of Kenneth B. Mason, Jr.*, 13 Vet. App.

79 (1999) and *Rice v. Shinseki*, 22 Vet. App. 447 (2009), for the propositions that the Court recognizes that where an attorney successfully represents a claimant before the Court (and where a qualifying attorney-client fee agreement is in place), VA is obligated to pay attorney fees of the past-due benefits awarded on the basis of the claim or application for benefits underlying the issues successfully appealed to the Court; and that the issue of a higher initial rating and the issue of TDIU are part and parcel of the same claim. The appellant further argued that she was eligible for attorney fees based on the award of TDIU because it was a claim that was underlying his claims of service connection for hearing loss and tinnitus appealed to the Court, and because it had previously been reasonably raised by the evidence of record. As evidence of this, she pointed to the fact that the RO assigned the effective date of the TDIU award in January 2006 (the same as the effective date for service connection for hearing loss and tinnitus) instead of the date that DAV filed the application for TDIU in January 2012. She asserted that her lack of representation after the initial schedular ratings for hearing loss and tinnitus were assigned did not preclude her entitlement to a fee for the later award of TDIU as those issues were all part of the issues of service connection that the appellant successfully appealed to the Court. She therefore believed the VA correctly paid her $20,204.16 based on the award of past due benefits from the RO's grant of TDIU effective in January 2006.

The Board, however, believes the appellant's interpretation of case law, as previously cited, to show a valid claim to the attorney fees in question would have an absurd result in cases, as here, where she effectively withdrew her representation, informing the Veteran there was no more work to be done on his case, and a subsequent representative advised him to file for benefits disregarded or overlooked by the appellant. (It would also raise questions as to whom attorney fees should be paid, if that subsequent representative turned out to be another attorney.) It appears that the appellant is attempting to bootstrap on and receive fees for services related to a subsequent claim, albeit related to the disabilities she prosecuted for the Veteran, despite the fact that she did not represent him any

longer. In regard to payment of attorney fees, the provision of 38 C.F.R. § 14.363(h)(3)(i) is elucidative:

> When the benefit granted on appeal… is service connection for a disability, the "past-due benefits" will be based on the initial disability rating assigned by the [RO] following the award of service connection. The sum will equal the payments accrued from the effective date of the award to the date of the initial disability rating decision. If an increased evaluation is subsequently granted as the result of an appeal of the disability evaluation initially assigned by the [RO], and *if the agent or attorney represents the claimant or appellant in that phase of the claim* [emphasis added], the agent or attorney will be paid a supplemental payment based upon the increase granted on appeal, to the extent that the increased amount of disability is found to have existed between the initial effective date of the award following the grant of service connection and the date of the rating action implementing the appellate decision granting the increase.

(This provision is also found in 38 C.F.R. § 20.609(h)(3)(i), in effect prior to the revisions in May 2008, with respect to decisions on which an NOD has been filed prior to June 20, 2007.) The regulations thus contemplate the scenario where VA may pay fees to an attorney for legal services in representing a veteran after service connection has been granted and an initial rating has been established, but will not authorize or permit additional attorney fees in a subsequent phase of the claim should the veteran appeal for a higher initial rating (and additional compensation) but is no longer represented by the attorney. The fact that the RO assigned an effective date of January 2006 for the award of TDIU, which is the same effective

date as the award of service connection for hearing loss and tinnitus, does not automatically entitle the appellant to more attorney fees based on the additional past due benefits awarded to the Veteran. Clearly, the appellant did not represent the Veteran in the subsequent phase of his claim, that is, the application for TDIU benefits, which thus bars her from claiming the $20,204.16 in attorney fees that the RO paid in error to her on July 23, 2012.

The Board also believes that the appellant misconstrues the application of 38 U.S.C.A. § 5904(d) and 38 C.F.R. § 14.636(h) in the context of this case. The appellant argues that where the claim of service connection is before the Board and Court, and such claim is subsequently granted, the attorney of record with a valid fee agreement is entitled to attorney fees from the payment of past due benefits based on the initial rating of the claim. The Board agrees. However, the appellant apparently believes that she should also be entitled to any additional past due benefits that accrue based on the original claim such as a higher initial rating or TDIU, without regard to whether her representation of the Veteran remains in effect. As noted in *Mason*, 13 Vet. App. at 86, the initial rating includes the ultimate rating granted by VA after a Court remand and before the decision on the issue by VA or the Board becomes final, as provided in 38 C.F.R. § 20.609(h)(3)(i) [or in 38 C.F.R. § 14.636(h)(3)(i), as amended in May 2008]. However, as cited above, the regulation contains the proviso that the attorney still represent the veteran "in that phase of the claim." It was not shown the appellant represented the Veteran in the phase of the claim where he subsequently filed for a TDIU.

The Court in *Mason* further noted, as emphasized by the appellant, that eligibility for TDIU was a rating question dependent on a grant of service connection; that eligibility for attorney fees would depend on whether the claim underlying the appeal to the Court included the TDIU issue; and that if reasonably raised by the evidence of record as part of the underlying claim for disability compensation, the TDIU rating would be part of the "initial rating" and the appellant would be entitled to attorney fees. *Mason,* 13 Vet. App. At 87. Here, the appellant argues that TDIU

must have been reasonably raised by the record as the RO would otherwise not have assigned an effective date for TDIU to be the same as that for service connection for hearing loss and tinnitus. The Board is not persuaded by this assertion. At the time of the grant of service connection in the August 2011 rating decision, the RO on its own found no evidence that the Veteran was unable to work due to hearing loss and tinnitus (as specifically remarked in the rating codesheet). The Veteran and appellant did not raise or pursue the claim for TDIU. However, upon receipt in January 2012 of a TDIU application containing additional evidence and information concerning the Veteran's employability, the RO reconsidered the issue and granted the claim effective in January 2006, because the Veteran had filed his claim for TDIU within a year of the August 2011 rating decision that established service connection for hearing loss and tinnitus from January 2006. Without determining whether the effective date for TDIU was proper, the Board finds that the regulations still require that the appellant must have continued her representation of the Veteran "in that phase of the claim" where the increased evaluation (*i.e.*, TDIU) was subsequently granted as the result of an appeal of the disability evaluation initially assigned by the RO. *See* of 38 C.F.R. § 14.363(h)(3)(i). It is reasonable to see that given dissatisfaction with the initial disability rating of 80 percent assigned by the RO in August 2011, the Veteran – with the assistance of DAV in January 2012 – sought to appeal for a higher initial rating through his application for TDIU.

In sum, for the reasons articulated, the Board finds that this case is not a "contested claims" case, that the VA's payment of $20,204.16 to the appellant as attorney fees on July 23, 2012 was not lawful but the result of VA error, and that the appellant's appeal to retain said payment must be denied.

IN THE APPEAL OF
CATHERINE CORNELL [redacted]

IN THE CASE OF
BOBBY S. MOBERLY

ORDER

The VA payment of $20,204.16 to the appellant as attorney fees on July 23, 2012 was not proper, and her appeal to retain such payment is denied.

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M. C. GRAHAM
Veterans Law Judge, Board of Veterans' Appeals

YOUR RIGHTS TO APPEAL OUR DECISION

The attached decision by the Board of Veterans' Appeals (BVA or Board) is the final decision for all issues addressed in the "Order" section of the decision. The Board may also choose to remand an issue or issues to the local VA office for additional development. If the Board did this in your case, then a "Remand" section follows the "Order." However, you cannot appeal an issue remanded to the local VA office because a remand is not a final decision. *The advice below on how to appeal a claim applies only to issues that were allowed, denied, or dismissed in the "Order."*

If you are satisfied with the outcome of your appeal, you do not need to do anything. We will return your file to your local VA office to implement the BVA's decision. However, if you are not satisfied with the Board's decision on any or all of the issues allowed, denied, or dismissed, you have the following options, which are listed in no particular order of importance:

- Appeal to the United States Court of Appeals for Veterans Claims (Court)
- File with the Board a motion for reconsideration of this decision
- File with the Board a motion to vacate this decision
- File with the Board a motion for revision of this decision based on clear and unmistakable error.

Although it would not affect this BVA decision, you may choose to also:

- Reopen your claim at the local VA office by submitting new and material evidence.

There is *no* time limit for filing a motion for reconsideration, a motion to vacate, or a motion for revision based on clear and unmistakable error with the Board, or a claim to reopen at the local VA office. None of these things is mutually exclusive - you can do all five things at the same time if you wish. However, if you file a Notice of Appeal with the Court and a motion with the Board at the same time, this may delay your case because of jurisdictional conflicts. If you file a Notice of Appeal with the Court ***before*** you file a motion with the BVA, the BVA will not be able to consider your motion without the Court's permission.

How long do I have to start my appeal to the court? You have **120 days** from the date this decision was mailed to you (as shown on the first page of this decision) to file a Notice of Appeal with the Court. If you also want to file a motion for reconsideration or a motion to vacate, you will still have time to appeal to the court. *As long as you file your motion(s) with the Board within 120 days of the date this decision was mailed to you,* you will have another 120 days from the date the BVA decides the motion for reconsideration or the motion to vacate to appeal to the Court. You should know that even if you have a representative, as discussed below, *it is your responsibility to make sure that your appeal to the Court is filed on time*. Please note that the 120-day time limit to file a Notice of Appeal with the Court does not include a period of active duty. If your active military service materially affects your ability to file a Notice of Appeal (e.g., due to a combat deployment), you may also be entitled to an additional 90 days after active duty service terminates before the 120-day appeal period (or remainder of the appeal period) begins to run.

How do I appeal to the United States Court of Appeals for Veterans Claims? Send your Notice of Appeal to the Court at:

Clerk, U.S. Court of Appeals for Veterans Claims
625 Indiana Avenue, NW, Suite 900
Washington, DC 20004-2950

You can get information about the Notice of Appeal, the procedure for filing a Notice of Appeal, the filing fee (or a motion to waive the filing fee if payment would cause financial hardship), and other matters covered by the Court's rules directly from the Court. You can also get this information from the Court's website on the Internet at: http://www.uscourts.cavc.gov, and you can download forms directly from that website. The Court's facsimile number is (202) 501-5848.

To ensure full protection of your right of appeal to the Court, you must file your Notice of Appeal **with the Court**, not with the Board, or any other VA office.

How do I file a motion for reconsideration? You can file a motion asking the BVA to reconsider any part of this decision by writing a letter to the BVA clearly explaining why you believe that the BVA committed an obvious error of fact or law, or stating that new and material military service records have been discovered that apply to your appeal. It is important that such letter be as specific as possible. A general statement of dissatisfaction with the BVA decision or some other aspect of the VA claims adjudication process will not suffice. If the BVA has decided more than one issue, be sure to tell us which issue(s) you want reconsidered. Issues not clearly identified will not be considered. Send your letter to:

Director, Management, Planning and Analysis (014)
Board of Veterans' Appeals
810 Vermont Avenue, NW
Washington, DC 20420

Remember, the Board places no time limit on filing a motion for reconsideration, and you can do this at any time. However, if you also plan to appeal this decision to the Court, you must file your motion within 120 days from the date of this decision.

How do I file a motion to vacate? You can file a motion asking the BVA to vacate any part of this decision by writing a letter to the BVA stating why you believe you were denied due process of law during your appeal. *See* 38 C.F.R. 20.904. For example, you were denied your right to representation through action or inaction by VA personnel, you were not provided a Statement of the Case or Supplemental Statement of the Case, or you did not get a personal hearing that you requested. You can also file a motion to vacate any part of this decision on the basis that the Board allowed benefits based on false or fraudulent evidence. Send this motion to the address above for the Director, Management, Planning and Analysis, at the Board. Remember, the Board places no time limit on filing a motion to vacate, and you can do this at any time. However, if you also plan to appeal this decision to the Court, you must file your motion within 120 days from the date of this decision.

How do I file a motion to revise the Board's decision on the basis of clear and unmistakable error? You can file a motion asking that the Board revise this decision if you believe that the decision is based on "clear and unmistakable error" (CUE). Send this motion to the address above for the Director, Management, Planning and Analysis, at the Board. You should be careful when preparing such a motion because it must meet specific requirements, and the Board will not review a final decision on this basis more than once. You should carefully review the Board's Rules of Practice on CUE, 38 C.F.R. 20.1400 -- 20.1411, and *seek help from a qualified representative before filing such a motion.* See discussion on representation below. Remember, the Board places no time limit on filing a CUE review motion, and you can do this at any time.

How do I reopen my claim? You can ask your local VA office to reopen your claim by simply sending them a statement indicating that you want to reopen your claim. However, to be successful in reopening your claim, you must submit new and material evidence to that office. *See* 38 C.F.R. 3.156(a).

Can someone represent me in my appeal? Yes. You can always represent yourself in any claim before VA, including the BVA, but you can also appoint someone to represent you. An accredited representative of a recognized service organization may represent you free of charge. VA approves these organizations to help veterans, service members, and dependents prepare their claims and present them to VA. An accredited representative works for the service organization and knows how to prepare and present claims. You can find a listing of these organizations on the Internet at: http://www.va.gov/vso/. You can also choose to be represented by a private attorney or by an "agent." (An agent is a person who is not a lawyer, but is specially accredited by VA.)

If you want someone to represent you before the Court, rather than before the VA, you can get information on how to do so at the Court's website at: http://www.uscourts.cavc.gov. The Court's website provides a state-by-state listing of persons admitted to practice before the Court who have indicated their availability to the represent appellants. You may also request this information by writing directly to the Court. Information about free representation through the Veterans Consortium Pro Bono Program is also available at the Court's website, or at: http://www.vetsprobono.org, mail@vetsprobono.org, or (855) 446-9678.

Do I have to pay an attorney or agent to represent me? An attorney or agent may charge a fee to represent you after a notice of disagreement has been filed with respect to your case, provided that the notice of disagreement was filed on or after June 20, 2007. *See* 38 U.S.C. 5904; 38 C.F.R. 14.636. If the notice of disagreement was filed before June 20, 2007, an attorney or accredited agent may charge fees for services, but only after the Board first issues a final decision in the case, and only if the agent or attorney is hired within one year of the Board's decision. *See* 38 C.F.R. 14.636(c)(2).

The notice of disagreement limitation does not apply to fees charged, allowed, or paid for services provided with respect to proceedings before a court. VA cannot pay the fees of your attorney or agent, with the exception of payment of fees out of past-due benefits awarded to you on the basis of your claim when provided for in a fee agreement.

Fee for VA home and small business loan cases: An attorney or agent may charge you a reasonable fee for services involving a VA home loan or small business loan. *See* 38 U.S.C. 5904; 38 C.F.R. 14.636(d).

Filing of Fee Agreements: In all cases, a copy of any fee agreement between you and an attorney or accredited agent must be sent to the Secretary at the following address:

Office of the General Counsel (022D)
810 Vermont Avenue, NW
Washington, DC 20420

The Office of General Counsel may decide, on its own, to review a fee agreement or expenses charged by your agent or attorney for reasonableness. You can also file a motion requesting such review to the address above for the Office of General Counsel. *See* 38 C.F.R. 14.636(i); 14.637(d).