

In the
UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS
APPELLANT'S BRIEF

No. 17-0092

ALLEN GUMPENBERGER

Appellant

v.

**DAVID J. SHULKIN, M.D.,
SECRETARY OF VETERANS AFFAIRS**

Appellee

August 28, 2017

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Statement of the Issues

1. The Board erred in denying attorney fees in excess of \$13,092.80. As an issue of first impression, the Board misinterpreted the term "past-due benefits awarded" in 38 U.S.C. § 5904(d)(1). Reversal is warranted.

2. Alternatively, the Board provided inadequate reasons and bases in its decision. The Board failed to discuss and apply *Snyder v. Nicholson*.

Statement of the Case

Nature of case

This is an issue of first impression with the Court. The VA's regulations continue to require a cash payment of benefits to the claimant before an award of attorney fees is authorized. The Federal Circuit has already ruled that this part of the regulation does not comport with the plain language of the statute. See *Snyder v. Nicholson*, 489 F.3d 1213 (Fed. Cir. 2007). The benefit at issue in *Snyder* dealt with benefits paid to an incarcerated veteran that was statutorily reduced to the 10% rate. In this case, the benefit at issue is the veteran's status as a non-fugitive felon and an overpayment and debt the Board found "was not properly created."

In both cases, the statute is clear. The VA must pay the attorney or agent 20% of any past due benefits awarded based on that agent's work. See § 5904. It makes no difference where the benefit originates.

Statement of Facts

In a May 2009 rating decision the VA terminated Mr. Graham's compensation benefits retroactive to December 2001. R. at 439-441. The VA erroneously determined that Mr. Graham was a fugitive felon. Later that month, the VA sent a letter to Mr. Graham informing him of a debt of \$199,158.70. R. at 437. In September 2013 the BVA issued a decision finding the overpayment in the amount of \$199,158.70 "was not properly created." The Board ultimately ordered "the alleged debt of \$199,158.70 is waived." R. at 166-170.

A November 2013 deferred rating decision stated the \$199,158.70 debt is not valid. R. at 162. Additionally, the record contains a February 2014 VISNET compensation and pension award identifying a \$199,158.70 "net effective award" resulting from the September 2013 BVA decision. R. at 142-143. The record also contains a February 2014 "retro award calculations" showing total amount due \$199,158.70. R. at 150.

The April 2014 rating decision implementing the BVA decision explicitly states Mr. Graham's "monthly entitlement" begins in 2001 and extends to 2014. R. at 144-147. The Regional Office issued a fee decision on the same day calculating Mr. Gumpenberger's fee, not from the \$199,000 retro award, but from the total amount that had been collected on the debt – \$65,464. R. at 132-134. Mr. Gumpenberger timely appealed this decision arguing his fee should have been calculated from the total award as opposed to the amount of cash returned to his client. R. at 128.

The RO issued a statement of the case in July 2014. R. at 91-107. Mr. Gumpenberger filed a timely appeal. R. at 83-85. He submitted a short argument with evidence in February 2015. R. at 56-68. The Board issued the decision on appeal in September 2016. R. at 2-7. The Board found that Mr. Gumpenberger had a valid fee agreement with Mr. Graham. R. at 6. The Board also correctly asserted that Mr. Gumpenberger's work resulted in the invalidation of the \$199,158.70 debt. *Id.* The Board concluded that because Mr. Graham was only given a cash payment of \$65,464, the "benefit" won by Mr. Gumpenberger's work was no more than the cash payment. R. at 7.

Argument

I. The Board erred in denying attorney fees in excess of \$13,092.80. The Board misinterpreted the term "past-due benefits awarded" in 38 U.S.C. § 5904(d)(1). Reversal is warranted.

This is an issue of first impression with the Court. Attorney's fees are authorized by 38 U.S.C. § 5904. Specifically, this statute authorizes certain fees "[are] to be paid to the agent or attorney by the Secretary directly from any past-due benefits awarded on the basis of the claim." § 5904(d)(1). The Federal Circuit has held that this statute is unambiguous – "the word 'award' ... means the amount stated as the award for success in pursuit of a claim for benefits." See *Snyder, supra* at 1219.

The *Snyder* Court found that the VA's regulations, limiting attorney's fees to the amount resulting in a cash payment, were not in line with the plain language of the

statue. *Id.* The Court also stated "[t]he statutes at issue offer no reason by the definition of an award of past-due benefits ... should change from time to time even with regard to the same veteran." *Id.*, at 1218.

The Federal Circuit addressed this issue again in 2015. In *Jackson* the Court reaffirmed that *Snyder* "rejected the Department's interpretation that the amount of an 'award,' as used in § 5904, depended on 'the amount actually payable' to the veteran." See *Jackson v. McDonald*, 635 Fed.Appx. 858, 860-861 (Fed. Cir. 2015) (*quoting Snyder, supra*).¹ The Federal Circuit found that attorney Jackson was entitled to a fee where the veteran had died before ever receiving his past due benefits.

Taken together the statute and *Snyder* inform us that an agent's fee, in a withholding fee agreement, is based on the "total amount of any past-due benefits awarded on the basis of the claim" whether that results in any money actually being paid to the veteran. *Snyder* dealt with a case where the veteran received compensation benefits, but the law did not permit him to receive the money; *Jackson* also dealt with compensation benefits awarded, but the claimant's death prevented him from receiving any money. In this case, the benefit awarded was partially compensation benefits, and, like in *Snyder*, only a portion of the total past-due benefit was paid to the claimant.

The VA defines a claim in two places. First, 38 C.F.R. § 3.1(p) defines a claim as "a written communication requesting a determination of entitlement or evidencing a belief in entitlement, to a specific benefit" Additionally, 38 C.F.R. § 20.3(f) defines a

¹ We acknowledge that *Jackson* is a non-precedential case; and cite it as persuasive authority under CAVC Rule 30(a).

claims as an "application made ... for entitlement to D[VA] benefits or for the continuation or increase of such benefits, or the defense of a proposed agency adverse action concerning benefits." Thus, a request for either of these benefits creates the "basis" for a veterans claim. In this case, Mr. Graham's application to continue his compensation and to defend the VA's adverse action formed the "basis" of his claim.

Therefore, the total amount of past-due benefits awarded is tied directly to the continuation of his already awarded compensation as well as the defense of the VA's finding that he was a fugitive felon and the VA's creation of the overpayment. In fact, 38 C.F.R. § 20.3(e) defines a benefit as "any payment, service, commodity, function, or status, entitlement to which is determined under laws administered by the D[VA]" Important to this appeal is that VA defines a benefit as both a "payment" and a "status."

Mr. Graham requested payment of his already awarded compensation benefits as well as his status as a non-fugitive felon. Therefore, the past-due benefits awarded stem directly from the favorable determinations from the Board. Specifically, the Board found that Mr. Graham was never a fugitive felon; and the Board found the entire debt – \$199,158.70 – "was not properly created." R. at 166-170. In fact, the Board reiterated this finding in the decision on appeal. See R. at 6 ("the favorable September 2013 decision resulted in the invalidation of the \$199,158.70 debt ...").

Furthermore, the VA explicitly found the full debt was the amount of past-due benefits awarded. R. at 142-143 & 150. In fact, the April 2014 rating decision informed Mr. Graham that "[his] monthly entitlement amount" began in 2001 (the date the VA

erroneously found him a fugitive felon) and ended in 2014. R. at 144. The VA took away all of Mr. Graham's VA compensation from 2001 to 2014. The VA also took away Mr. Graham's legal right to his compensation benefits from 2001 to 2014. The favorable decision from the Board returned to Mr. Graham the legal right to receive his compensation; and returned the actual compensation taken away. Therefore, the past-due benefits included both Mr. Graham's legal right to him compensation and the actual compensation – not just the total cash paid to him.

The Federal Circuit warned that § 5904 does not allow for the amount of past-due benefits to "change from time to time even with regard to the same veteran." See *Snyder, supra* at 1218. The VA's definition of past-due benefits, limited to only the amount of cash paid to the veteran, would create just such a situation. Hypothetically, had Mr. Graham been awarded \$100,000 in retroactive compensation at the same time the VA erroneously created the overpayment, the VA would have withheld this entire amount to satisfy the overpayment. Then, when the Board erased the overpayment Mr. Graham would have received \$166,464 in cash (the hypothetical \$100,000 retro plus the actual \$65,464 withheld during the pendency of the appeal). There is just no logical or legal basis for the VA's position.

Thus, the Board misinterpreted the definition of "past-due benefits" in § 5904(d)(1). The statute and the case law require that Mr. Gumpenberger is entitled to 20% of all past-due benefits awarded. The total amount of past-due benefits awarded is the full amount of overpayment created. Mr. Graham received the benefit of eliminating

the entire overpayment of \$199,158.70. Therefore, the Court must reverse the Board's finding, and find that Mr. Gumpenberger is entitled to an attorney fee of \$39,831.74.

2. Alternatively, the Board provided inadequate reasons and bases in its decision. The Board failed to discuss and apply *Snyder v. Nicholson*.

Mr. Gumpenberger argues in the alternative that the Board provided inadequate reasons and bases for its decision. As explained above, the Federal Circuit ruled, in *Snyder*, that the VA's requirement that past-due benefits result in a cash payment to the claimant is not in line with the statutory language. See *Snyder, supra*. The Board failed to reconcile the Federal Circuit's holding with the facts of this case.

Instead, the Board simply found that Mr. Gumpenberger was only entitled to a fee based on the total cash paid to Mr. Graham. R. at 7. Each Board decision must provide adequate reasons and bases for its determinations. See 38 U.S.C. § 7104(d)(1). This Board decision does not inform the Court or Mr. Gumpenberger on how *Snyder* would change its analysis, if at all. Therefore, Mr. Gumpenberger argues alternatively that the Board decision should be vacated and remanded for adequate reasons and bases.

Conclusion

For the reasons set forth above, Mr. Gumpenberger respectfully requests that this Court provide relief by reversing the Board's September 2016 decision, and order that his fee be based on the total benefit awarded – \$199,158.70.

Respectfully submitted,

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