

**IN THE UNITED STATES COURT
OF APPEALS FOR VETERANS CLAIMS**

ALLEN GUMPENBERGER,

Appellant,

v.

DAVID J. SHULKIN, M.D.,
Secretary of Veterans Affairs,

Appellee.

**ON APPEAL FROM THE
BOARD OF VETERANS' APPEALS**

**BRIEF OF THE APPELLEE
SECRETARY OF VETERANS AFFAIRS**

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TABLE OF CONTENTS

TABLE OF AUTHORITIESii

RECORD BEFORE AGENCY CITATIONSiii

ISSUE PRESENTED.....1

STATEMENT OF THE CASE1

A. Jurisdictional Statement.....1

B. Nature of the Case.....1

C. Statement of Facts.....2

SUMMARY OF ARGUMENT4

ARGUMENT.....4

THE COURT SHOULD AFFIRM THE BOARD’S DECISION DENYING ENTITLEMENT TO ATTORNEY FEES IN EXCESS OF \$13,092.80.....4

CONCLUSION 12

TABLE OF AUTHORITIES

Federal Cases	Page(s)
<u>Bucklinger v. Brown</u> , 5 Vet. App. 435 (1993)	<u>12</u>
<u>Ford v. Gober</u> , 10 Vet. App. 531 (1997)	<u>12</u>
<u>Hilkert v. West</u> , 12 Vet. App. 145 (1999)	<u>11</u>
<u>Jackson v. McDonald</u> , 635 F. App'x 858 (Fed. Cir. 2015)	<u>7</u>
<u>Locklear v. Nicholson</u> , 20 Vet. App. 410 (2006)	<u>11</u>
<u>Sabonis v. Brown</u> , 6 Vet. App. 426 (1994)	<u>10-11</u>
<u>Shinseki v. Sanders</u> , 129 S. Ct. 1696 (2009)	<u>11</u>
<u>Smith v. West</u> , 11 Vet. App. 56 (1998)	<u>12</u>
<u>Snyder v. Nicholson</u> , 489 F.3d 1213 (Fed. Cir. 2007)	<u>5, 7, 8, 9, 10</u>
<u>Soyini v. Derwinski</u> , 1 Vet. App. 540 (1991)	<u>11</u>
<u>Woehlaert v. Nicholson</u> , 21 Vet. App. 456 (2007)	<u>11</u>
 Federal Statutes	
38 U.S.C. § 1110	<u>8</u>
38 U.S.C. § 1114	<u>8</u>
38 U.S.C. § 5510	<u>8</u>
38 U.S.C. § 5904	<u>5, 7, 8, 9</u>
38 U.S.C. § 7252	<u>1, 2, 3</u>
38 U.S.C. § 7292	<u>8</u>
 Federal Regulations	
38 C.F.R. § 14.636	<u>5, 7</u>

RECORD BEFORE AGENCY CITATIONS

<u>RBA Page</u>	<u>Brief Page</u>
R. at 2-7 (BVA Decision)	4, 6, 7
R. at 74 (DD-214)	2
R. at 86-88 (VA Form 9 with cover letter).....	4
R. at 89-107 (Statement of the Case)	4
R. at 128 (Notice of Disagreement).....	4
R. at 135-36 (Letter from Regional Office)	3, 6
R. at 144-47 (Letter from Regional Office)	3
R. at 166-70 (BVA Decision)	3, 6, 10
R. at 221 (Form 21-22a).....	2
R. at 308 (Form 21-22a).....	3
R. at 310 (Form 21-22a).....	3
R. at 312 (Fee Agreement).....	3
R. at 314 (Informal Claim)	3
R. at 337 (Appeal to BVA).....	3
R. at 339-54 (Statement of the Case)	3
R. at 421 (Letter to Committee on Waivers & Compromise).....	3
R. at 437 (Letter from Debt Management Center)	2
R. at 439-41 (Letter from Regional Office)	2
R. at 451-54 (Notice of Warrant Cancellation & associated documents)	2
R. at 468-70 (Letter from Regional Office)	2

**IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS**

ALLEN GUMPENBERGER,)	
)	
Appellant,)	
)	
v.)	Vet. App. No. 17-0092
)	
DAVID J. SHULKIN, M.D.,)	
Secretary of Veterans Affairs,)	
)	
Appellee.)	

**ON APPEAL FROM THE
BOARD OF VETERANS' APPEALS**

**BRIEF OF THE APPELLEE
SECRETARY OF VETERANS AFFAIRS**

ISSUE PRESENTED

Whether the Court should affirm the Board of Veterans Appeals (BVA or Board) decision denying entitlement of attorney fees in excess of \$13,092.80.

STATEMENT OF THE CASE

A. Jurisdictional Statement

The Court has jurisdiction pursuant to 38 U.S.C. § 7252(a).

B. Nature of the Case

Appellant in this case, Allen Gumpenberger (Appellant), appeals a September 16, 2016, BVA decision that denied entitlement to attorney fees in excess of \$13,092.80 for past-due benefits stemming from a favorable

September 2013 BVA decision that found an overpayment in VA benefits in the amount of \$199,158.70, was not a valid debt.

C. Statement of Facts

The Veteran in this case, Edward G. Graham (Veteran), had active service in the United States Marine Corps from May 1967 to March 1970. [R. at 74]. The Appellant, Allen Gumpenberger, was the Veteran's agent before VA. [R. at 221].

In January 2009, the VA Regional Office (RO) advised the Veteran that law enforcement authorities had identified him as a fugitive felon because he was the subject of an outstanding warrant. [R. at 468-70]. The RO proposed to terminate his VA compensation benefits, retroactively to December 27, 2001, because of the outstanding warrant. *Id.*

In February 2009, a Notice of Warrant Cancellation from the Trial Court of Massachusetts, District Court Department showed that the outstanding warrant was cancelled on February 4, 2009. [R. at 451(451-54)].

In May 2009, the RO issued an administrative decision establishing an overpayment for the period during which the Veteran had an active, outstanding felony warrant, *i.e.*, December 27, 2001, through February 4, 2009. [R. at 439 (439-41)]. This resulted in the creation of a debt in the amount of \$199,158.70. [R. at 437]. VA advised the Veteran that it planned to withhold his service-connected compensation benefits until the debt was recouped, with the

withholding schedule to begin in August 2009. *Id.* The Veteran appealed this decision. [R. at 421]. A Statement of the Case was issued in January 2010. [R. at 339-54]. The Veteran perfected an appeal to the BVA in January 2010. [R. at 337].

In January 2011, the Veteran appointed Appellant as his agent and the parties entered into a valid fee agreement. [R. at 308, 310, 312, 314].

In September 2013, the BVA issued a decision finding that the debt created against the Veteran was invalid and waiving repayment of the debt in the amount of \$199,158.70. [R. at 166-70]. In February 2014, the RO implemented the Board's decision that the debt was not properly created. [R. at 144-47].

In April 2014, the RO advised the Veteran that, pursuant to the fee-agreement he entered with Appellant, it was withholding 20 percent of the award of past-due benefits. [R. at 135-36]. The RO indicated during the pendency of the Veteran's appeal, \$65,464.00 had been recouped toward the invalidated debt. [R. at 136 (135-36)]. The agency determined that the appropriate attorney fee resulting from the Board's decision invalidating the debt was \$13,092.80, which is 20 percent of \$65,464.00 – the amount VA recouped from the Veteran before the debt was invalidated by the Board in September 2013. *Id.*

Appellant submitted a notice of disagreement with this determination in April 2014, asserting that he was entitled to an attorney fee of \$39,831.74, which is 20 percent of \$199,158.70 – the full amount of the invalidated debt. [R. at

128]. A Statement of the Case was issued in July 2014. [R. at 89-107]. Appellant perfected an appeal to the Board in August 2014. [R. at 86-88].

On September 16, 2016, the BVA issued the decision on appeal denying entitlement to attorney fees in excess of \$13,092.80 for past-due benefits stemming from the favorable September 2013 BVA decision that found an overpayment in VA benefits in the amount of \$199,158.70, was not a valid debt. [R. at 2-7]. The instant appeal ensued.

SUMMARY OF ARGUMENT

The Court should affirm the Board's decision denying entitlement to attorney fees in excess of \$13,092.80 for past-due benefits stemming from the favorable September 2013 BVA decision that found an overpayment in VA benefits in the amount of \$199,158.70, was not a valid debt. The Board properly applied VA statutes and regulations regarding payment of fees out of past-due benefits and correctly determined that the amount of past-due benefits in this case is \$65,464.00, resulting in attorney fees of \$13,092.80.

ARGUMENT

THE COURT SHOULD AFFIRM THE BOARD'S DECISION DENYING ENTITLEMENT TO ATTORNEY FEES IN EXCESS OF \$13,092.80.

A VA claimant and an accredited attorney or agent may enter into a fee agreement regarding services provided after a Notice of Disagreement has been filed with respect to the claimant's case. 38 U.S.C. § 5904(c)(1). Generally, an

“attorney is responsible for collecting any fees for representation from the claimant without assistance from VA.” 38 C.F.R. § 14.636(g)(2).

However, if an attorney or agent desires VA’s assistance in collecting the fee, a provision may be included in the fee agreement providing that payment for the services will be made directly to the attorney by VA out of any past-due benefits awarded in a proceeding before VA or an appellate court. 38 U.S.C. § 5904(d). The total fee payable to any attorney under such a fee agreement “may not exceed 20 percent of the total amount of any *past-due* benefits awarded on the basis of the claim.” 38 U.S.C. § 5904(d)(1) (emphasis added). The statute limits the amount of the fee to no more than 20 percent of the total past-due benefits awarded to the veteran and also precludes an attorney from claiming as a fee a portion of the future monthly benefits that will be paid to the veteran. See *Snyder v. Nicholson*, 489 F.3d 1213, 1216 (Fed. Cir. 2007). The statute further provides that a fee pursuant to a statutory fee agreement is to be paid to the attorney by VA directly from any past-due benefits awarded on the basis of the claim. 38 U.S.C. § 5904(d)(2)(A)(i). The statute also states that a fee pursuant to a statutory fee agreement “is to be paid to the attorney by the Secretary directly from any past-due benefits awarded on the basis of the claim.” 38 U.S.C. § 5904(d)(2)(A)(i).

In the present case, VA found, and the Veteran does not dispute, that the Appellant has a valid fee agreement providing for a fee of 20 percent of past-due benefits awarded for his representation of the Veteran in the appeal of the validity

of the debt in the amount of \$199,158.70. That debt was invalidated in its entirety in a September 2013 Board decision. [R. at 166-70]. Prior to the Board's September 2013 decision invalidating the debt, VA had recouped \$65,464.00 toward repayment of that debt. [R. at 136 (135-36)]. As the Board noted, the amount of funds collected from the Veteran by VA to satisfy the debt has not been disputed by either party.

The dispute in this case concerns the amount of "past-due benefits awarded" for purpose of calculating the fee to which Appellant is entitled. In the decision on appeal, the Board found that the Appellant is not entitled to attorney fees in excess of \$13,092.80, *i.e.* 20 percent of the \$65,464.00 that VA recouped toward the invalidated debt. In reaching this decision, the Board noted that, although Appellant's representation resulted in the invalidation of the entire \$199,158.70 overpayment, it did not result in an award of past-due benefits in that amount, nor did it result in the award of that amount as a new disability benefit. [R. at 6 (2-7)]. Indeed, the Veteran had already been awarded the \$199,158.70 in disability compensation. At issue in the September 2013 Board decision was whether the Veteran was required to repay that amount to VA as an overpayment.

Due to the Board's September 2013 favorable decision, the Veteran was found to be not responsible for repaying the debt and the debt was invalidated. [R. at 166-70]. However, during the pendency of the Veteran's appeal to invalidate the debt, VA had collected a total of \$65,464.00 from the Veteran's

disability compensation toward repayment of that debt. [R. at 7 (2-7)]. The Board determined that it was that amount, *i.e.*, the total monies collected to repay the debt, which represents the past-due cash benefits awarded to the Veteran under VA statutes and regulations. In accordance with that determination, it concluded that the proper amount of attorney fees payable to Appellant was \$13,092.80, which is 20 percent of \$65,464.00. The Secretary respectfully submits that this determination is consistent with 38 U.S.C. § 5904 and 38 C.F.R. §14.636 and should be affirmed.

In his brief, Appellant asserts that the Board erred by misinterpreting the term “past-due benefits” as that term is used in 38 U.S.C. § 5904(d)(1). (Appellant’s Brief (App.Br.) at 3-7). He contends that the statute’s plain language provides for a fee of 20 percent of the amount of the “award” of past-due benefits, which, he submits is the full amount of the invalidated debt (\$199,158.70), not the lesser amount of \$65,464.00 that was recouped from the Veteran prior to the September 2013 Board decision. In support of this argument, Appellant cites the United States Court of Appeals for the Federal Circuit’s decision in *Snyder v. Nicholson*, 489 F.3d 1213 (Fed. Cir. 2007) as well as a non-precedential Federal Circuit decision in *Jackson v. McDonald*, 635 Fed.Appx 858, 860-61 (Fed. Cir. 2015), which is cited only for its persuasive authority. Alternatively, Appellant asserts that the Board’s statement of reasons or bases is inadequate because it failed to discuss and apply *Snyder*. (App.Br. at 7).

The Secretary respectfully submits that Appellant's arguments lack merit, as discussed below. Appellant indicates that this is an issue of first impression with the Court. (App.Br. at 3). The Secretary disagrees. This case does not present an issue of first impression because the United States Court of Appeals for the Federal Circuit ("Federal Circuit") already interpreted the term "past-due benefits awarded" on the basis of a claim as that term is used in 38 U.S.C. § 5904(d)(1) in *Snyder v. Nicholson*, 489 F.3d 1213 (Fed. Cir. 2007). The Federal Circuit's decision in *Snyder* is binding on this Court. See 38 U.S.C. § 7292.

The *Snyder* Court held that the statutory language in 38 U.S.C. § 5904(d)(1) provided "a clear answer" to the meaning of that section. Specifically, a claimant's service-connected disability forms the "basis" of his or her claim for compensation. *Snyder*, 489 F.3d at 1218; see also 38 U.S.C. § 1110 ("For disability resulting from personal injury suffered . . . in line of duty . . . the United States will pay to any veteran thus disabled . . . compensation as provided in [38 U.S.C. § 1114.]"). The *Snyder* Court explained that in order to make an "award[]" on the "basis" of that claim, "VA must assign a disability rating to the claimant by determining 'the average impairments of earning capacity resulting from [the claimant's] injuries in civil occupations.'" *Id.* quoting 38 U.S.C. § 1155. "That rating is then used to set the claimant's monthly compensation." *Id.*; 38 U.S.C. § 1114. Thus, "[a]ny compensation *not paid to the claimant in a given month* becomes a 'past-due benefit[.]'" *Id.* (Emphasis added); see, e.g., 38 U.S.C. § 5510(2) (categorizing "compensation" as a "type[] of benefit"). The

Snyder Court held that the “total amount of any past-due benefits awarded on the basis of the claim’ is the sum of each month's unpaid compensation--as determined by the claimant's disability rating--beginning on the effective date and continuing through the date of the award.” *Snyder*, 489 F.3d at 1218.

Appellant’s argument that the entire debt in the amount of \$199,158.70 represents the total amount of past-due benefits awarded on the basis of his claim is not consistent with the Federal Circuit’s decision in *Snyder*. His argument fails to recognize that this case involves recoupment of an overpayment.

There are two ways to look at the relief the Veteran obtained from the 2013 Board decision. One is to view the issue as the right to receive full benefits during what would otherwise be the period of recoupment. The other is the right to receive VA benefits from December 27, 2001, to February 4, 2009, (the period for which the Veteran was allegedly a fugitive felon). Under either approach, the end result is the same.

The controlling statute, 38 U.S.C. § 5904(d)(3), expressly states that “[i]n 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 Court of Appeals for Veterans Claims making (or ordering the making of) the award.”

In the first scenario (*i.e.*, if the issue is the right to receive full payment going forward, rather than being subject to the recoupment), the Board decision

granting that relief was issued on September 27, 2013. [R. at 166-70]. Therefore, benefits to which the Veteran is entitled from September 28, 2013, (the day following the Board's decision through when the recoupment would have otherwise ended) would be "future" benefits. In other words, the "past-due benefits" would be limited to the recoupment that VA had completed as of the date of the September 27, 2013 Board decision, which was \$65,464.00.

As for the other way to look at the issue, in *Snyder*, the Federal Circuit expressly held that "the 'total amount of any past-due benefits awarded on the basis of the claim' is the sum of each month's *unpaid* compensation--as determined by the claimant's disability rating--beginning on the effective date and continuing through the date of the award." *Snyder*, 489 F.3d 1213, 1218 (Fed. Cir. 2007) (emphasis added). If the relief obtained by the Veteran is the right to receive benefits from December 27, 2001, to February 4, 2009, (the period for which the Veteran was allegedly a fugitive felon), it is undisputed that those benefits were paid for that during that period. Therefore, before the recoupment began, none of those benefits were *unpaid* and, therefore, none of them constituted past-due benefits. Benefits only became unpaid as they were recouped. Therefore, again, the amount of past-due benefits is limited to the amount of the recoupment as of the date of the Board decision, *i.e.*, \$65,464.00.

Based on the aforementioned reasoning, the Secretary submits that the Board correctly determined that attorney fees in excess of \$13,092.80 (20 percent of \$65,464.00) were not warranted in the instant case. See *Sabonis v.*

Brown, 6 Vet. App. 426 (1994) (where the law is dispositive, the claim must be denied due to an absence of legal entitlement). Further, Appellant's argument that the Board's statement of reasons or bases is inadequate because it did not discuss and apply *Snyder* should be rejected. The essential facts in this case are not in dispute. Remand to for the Board to cite *Snyder* when it properly calculated the correct fee under the controlling statutes and regulations would provide no benefit to Appellant and would serve only to impose unnecessary burdens on VA. See *Soyini v. Derwinski*, 1 Vet.App. 540, 546 (1991).

The Court should affirm the Board decision denying Appellant's claim for attorney fees in excess of \$13,092.80 due to the lack of a persuasive argument warranting a different result. Appellant has not presented any discernible argument demonstrating remandable or reversible BVA error. See *Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc) (holding that appellant bears burden of demonstrating error on appeal); *Sanders v. Shinseki*, 129 S.Ct. at 1705-06 (party attacking agency determination has burden of showing error is harmful). Appellant has not identified any law or regulation that was wrongfully applied by the Board in its decision, nor does he offer any legal or factual challenge to demonstrate that the BVA decision is clearly erroneous. See *Locklear v. Nicholson*, 20 Vet.App. 410, 416-417 (2006).

The Court should consider Appellant to have abandoned any issues not directly addressed in his brief. See *Woehlaert v. Nicholson*, 21 Vet.App. 456, 463 (2007) ("This Court has consistently held that it will not address issues or

arguments that counsel for the appellant fails to adequately develop in his or her opening brief.”); (*Smith v. West*, 11 Vet.App. 56, 57 (1998); *see also Ford v. Gober*, 10 Vet.App 531, 535 (1997); *Bucklinger v. Brown*, 5 Vet.App. 435, 436 (1993).

CONCLUSION

For the foregoing reasons, Appellee, Secretary of Veterans Affairs, respectfully requests the Court to affirm the September 16, 2016, decision on appeal.

Respectfully submitted,

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