

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

No. 17-0092

ALLEN GUMPENBERGER

Appellant

v.

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

Appellee

January 23, 2018

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Appellant's Reply Arguments

Mr. Gumpenberger stands by all arguments in his opening brief. This brief contains two replies to the Secretary's arguments.

I. This is an issue of first impression because the statute and *Snyder* have never before been applied to this unique claim.

The Secretary asserts "[t]his case does not present an issue of first impression because the [CAFC] 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)." Brief for the Appellee, at 8. This is an overly broad description of the ruling in *Snyder*. The actual ruling in *Snyder* was more limiting. The *Snyder* Court was concerned with a claim for compensation benefits. See *Snyder*, at 1214-1215 ("The RO concluded on remand that the July 2002 claim for service connection should have been approved").

However, as explained in Mr. Gumpenberger's opening brief § 5904(d)(1) concerns "**any past-due benefits awarded** on the basis of the claim." And as the *Snyder* Court ruled "[t]he word 'award' is clear and unambiguous, and in the parlance of veterans' benefits it means the amount stated as the award for success in pursuit of a claim for benefits." *Snyder*, at 1219. Mr. Gumpenberger explained in his opening brief that this case deals with a benefit that is part compensation, part status, and part debt/overpayment. VA regulations define a benefit as both a payment and a status. See 38 C.F.R. § 20.3(e).

Neither this Court nor the Federal Circuit have issued a decision that explains how § 5104(d)(1) applies to benefits that are not compensation benefits. Likewise, the Courts have not had the occasion to address how § 5104(d)(1) applies to awards that are not compensation awards, but still entail some monetary benefit to the claimant. Therefore, we reiterate that this is an issue of first impression.

II. The benefit won by Mr. Gumpenberger was the invalidation of the \$199,158.70 debt. This forms the basis of the attorney fee.

The Board decision explicitly ruled "the favorable September 2013 decision resulted in the invalidation of the \$199,158.70 debt" R. at 6. Furthermore, the RO, in two separate calculations, determined the "RETRO ... AWARD" is \$199,158.70." R. at 150. In fact, the Hartford RO determined "[t]he potential net award entitlement is \$199,158.70 before applying any finance deductions." R. at 143 (142-143). Three times the Secretary has stated the benefit won by Mr. Gumpenberger is \$199,158.70.

Most importantly, the Board ruled the benefit won "resulted in the invalidation of the \$199,158.70 debt" R. at 6 (2-7). Although Mr. Graham only received a cash payment representing the amount previously recouped, this does not change the nature of the benefit won on appeal. See *Snyder, supra*, at 119 ("[t]he word 'award' is clear and unambiguous, and in the parlance of veterans' benefits it means the amount stated as the award for success in pursuit of a claim for benefits").

The Secretary's reliance on the ruling in *Snyder* is misplaced. The Court in *Snyder* was not ruling on a claim for invalidation of a debt. Therefore, the discussion of unpaid compensation is irrelevant to the issue here. See Brief for the Appellee, at 10.

Conclusion

For the reasons set forth above, and in his opening brief, 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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