IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

BRYAN J. HELD,	)	
Appellant,	)	
	)	
v.	)	VET. APP. NO. 21-8048
	)	
DENIS MCDONOUGH,	)	
Secretary of Veterans Affairs,	)	
Appellee,	)	

APPELLEE'S MOTION FOR RECONSIDERATION BY THE PANEL

Under VET. APP. R. 35(a)(1), Appellee, Secretary of Veterans Affairs, respectfully moves the Court for panel reconsideration of its November 14, 2023, decision that found 38 C.F.R. § 14.636(c)(2)(ii) is invalid because it contravenes the plain and ordinary meaning of 38 U.S.C. § 5904(c)(1).

Panel reconsideration is warranted because the Court's November 14, 2023, decision overlooked or misunderstood the following points of law or fact. *See* VET. APP. R. 35(a)(1).

A. The Version of 38 U.S.C. § 5904(c)(1), as Amended by the AMA, Does Not Have Retroactive Effect, and 38 C.F.R. § 14.636(c)(2)(ii) is Valid Because it is Consistent with the Pre-AMA Version of 38 U.S.C. § 5904(c)(1) that Applies in This Case

The Court held that 38 U.S.C. § 5904(c)(1), given its plain and ordinary meaning, permits paid representation once a claimant receives notice of the AOJ's "initial decision . . . with respect to the case." *Held v. McDonough*, Vet. App. No. 21-8048, Decision at *2 (November 14, 2023). The Secretary believes that the Court misunderstood the current version of 38 U.S.C. § 5904(c)(1) to have

retroactive effect prior to the date that Congress prescribed for the current version of the statute to become effective.[1] "Retroactivity is not favored in the law," and "congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208, (1988); *Presidio Components, Inc. v. Am. Tech. Ceramics Corp.*, 702 F.3d 1351, 1364 (Fed. Cir. 2012) ("An Act must clearly indicate its retroactive application."). The presumption against retroactive application of a statute applies with special force in situations in which such application "would have genuinely 'retroactive' effect," *Landgraf*, 511 U.S. at 277, *e.g.,* where "it would . . . increase a party's liability for past conduct, or impose new duties with respect to transactions already completed," *id.* at 280; *see also Princess Cruises v. United States*, 397 F.3d 1358, 1366–67 (Fed. Cir. 2005) (stating that retroactive application of a new law is disfavored because it upends settled expectations). Accordingly, the Court should have construed 38 U.S.C.

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[1] The current version of 38 U.S.C. § 5904(c)(1)—the same version in effect at the time of the December 2019 RO decision on the Veteran's CUE motion—became effective on February 19, 2019. VETERANS APPEALS IMPROVEMENT AND MODERNIZATION ACT OF 2017 (AMA), Pub. L. No. 115-55 sec. 2(x) (stating that the AMA "shall apply to all claims for which notice of a decision under section 5104 of title 38, United States Code, is provided by the Secretary of Veterans Affairs," on or after February 19, 2019, the effective date of the AMA).

§ 5904(c)(1) to avoid retroactivity unless there is clear evidence that Congress intended otherwise.

The Court correctly noted that "[w]ords matter," and it matters which words Congress did not use. *Held v. McDonough*, Vet. App. No. 21-8048, Decision at *1 (November 14, 2023). In the AMA, when revising 38 U.S.C. § 5904(c)(1), Congress did not use any words that "require[]" the Court to construe the amended version of the statute to have retroactive effect. *Bowen*, 488 U.S. at 208. The Federal Circuit has held that "[a]n Act must clearly indicate its retroactive application," but the Court's decision does not cite any text of the AMA that clearly indicates it should be applied retroactively. *Presidio Components, Inc.*, 702 F.3d at 1364.

VA's regulation implementing the AMA's revision of 38 U.S.C. § 5904(c)(1) was structured to avoid giving the revised statute retroactive effect since Congress did not use any words stating that the revised version of 38 U.S.C. § 5904(c)(1) should have retroactive effect. Broadly, 38 C.F.R. § 14.636(c)(1) was intended to reflect the current rule under 38 U.S.C. § 5904 (effective February 19, 2019); 38 C.F.R. § 14.636(c)(2) reflects the rule under 38 U.S.C. § 5904 as amended in 2006 (effective June 20, 2007); and § 14.636(c)(3) reflects the rule under section 38 U.S.C. § 5904 as amended in 1988 and 2001 (the latter removing a requirement that it only applied to cases in which an Notice of Disagreement (NOD) was filed after 1988).

The correct law for the Court to apply in reviewing the validity of 38 C.F.R. § 14.636(c)(2) is the 2006 public law, Pub. L. 109–461, title I, §101(h), Dec. 22, 2006, 120 Stat. 3408, which provided that: "The amendments made by subsections (c)(1) and (d) [amending this section] shall take effect on the date that is 180 days after the date of the enactment of this Act [Dec. 22, 2006] and shall apply with respect to services of agents and attorneys that are provided with respect to cases in which notices of disagreement are filed on or after that date." The 2006 law, referred to by the Court as the "legacy fee statute," *Held*, Vet. App. No. 21-8048, Decision at *12, is consistent with, and fully supports, 38 C.F.R. § 14.636(c)(2), which provides that "a fee may not be charged, allowed, or paid for services of agents and attorneys with respect to services provided before the date on which a notice of disagreement is filed with respect to the case." 38 U.S.C. § 5904(c)(1) (2006). Accordingly, in the matter before the Court, the 2006 law prohibited charging fees before a notice of disagreement was filed with respect to the case.

When Congress revised 38 U.S.C. 5904 in 2019 to change the fee-triggering event from the filing on a NOD to issuance of an AOJ decision, it did not use any words that "require[]" the Court to construe the amended version of the statute to have retroactive effect. *Bowen*, 488 U.S. at 208. The Court's decision does not cite any text of the AMA that it found to "clearly indicate its retroactive application." *Presidio Components, Inc.*, 702 F.3d at 1364. The Secretary finds no such

language in the AMA. The Court emphasized that "the real work in terms of the appropriateness of the fees at issue is done by the phrase "initial decision . . . with respect to the case" in 38 U.S.C. § 5904. *Held*, Vet. App. No. 21-8048, Decision at *2. Further, the Court noted that "the parties agree[d]—and the Court concur[red]—that under section 5904(c)(1), the 'initial decision . . . with respect to the case' refers to the February 2017 [Regional Office (RO)] decision concerning the veteran's PTSD rating, the decision in which the veteran later asserted CUE was present." *Id.* Because the AMA-amended version of 38 U.S.C. § 5104(c)(1) should not have been construed as having retroactive effect, and because the parties and the Court all agreed that the "initial decision . . . with respect to the case" refers to the February 2017 RO decision that was challenged on the basis of CUE, the Court should have applied the legacy fee statute, *i.e.*, Pub. L. 109–461, title I, §101(h), Dec. 22, 2006, 120 Stat. 3408, which Congress stated "shall apply with respect to services of agents and attorneys that are provided with respect to cases in which notices of disagreement are filed on or after [June 20, 2007]." *See* 38 U.S.C. 5904(c)(1) (2006). The 2006 law is consistent with, and fully supports, 38 C.F.R. § 14.636(c)(2) and should have been applied in this case. The Court held that 38 C.F.R. "§ 14.636(c)(2)(ii) requires more than Congress required in section 5904(c)(1)," *Held*, Vet. App. No. 21-8048, Decision at *7, but the Court did not address why it found that Congress required the AMA-revised version of 38 U.S.C. § 5904(c)(1) to apply retroactively.

B. Caselaw Does Not Support Invalidating 38 C.F.R. § 14.636(c)(2)(ii)

The Federal Circuit's decision in *Mil.-Veterans Advoc. Inc. v. Sec'y of Veterans Affairs* (*MVA*), 7 F.4th 1110, 1135 (Fed. Cir. 2021) invalidated paragraph (c)(1)(i) of 38 C.F.R. § 14.636. In the Secretary's view, fees could be paid for services provided after the December 2019 decision on Appellant's CUE motion (which was granted in this case) but not before. Prior to the decision in *MVA*, the regulation had specifically addressed the circumstances of this case, specifying that for purposes of paragraph 38 C.F.R. § 14.636(c)(1)(i), "an initial decision on a claim would include . . . an initial decision on a request to revise a prior decision based on clear and unmistakable error (unless fees are permitted at an earlier point pursuant to paragraph (c)(1)(ii) or paragraph (c)(2)(ii) of this section)." Although the Federal Circuit in *MVA* invalidated paragraph (c)(1)(i), the core holding in *MVA* was that the distinction in (c)(1)(i) between 38 U.S.C. § 5104C(a) (continuously pursued) supplemental claims and § 5104C(b) supplemental claims was invalid. *MVA*, 7 F.4th at 1148 ("Section 14.636(c)(1)(i)'s restriction on attorneys' fees for § 5104C(b) supplemental claims is invalid because it contravenes the plain and ordinary meaning of § 5904(c)(1), which permits paid representation once a claimant receives notice of the AOJ's 'initial decision . . . with respect to the case.'"); *see id.* at 1137 ("*MVA* argues that the regulation's unequal treatment of § 5104C(a) and § 5104C(b) supplemental claims violates the AMA's 'unambiguous[] require[ment] that all work on supplemental claims be

capable of compensation.'"). *MVA* did not address 38 C.F.R. § 14.636(c)(2) or whether the AMA-revised version of 38 U.S.C. § 5904(c)(1) could apply retroactively. Notably, in *MVA*, the Federal Circuit rejected for lack of standing a challenge to 38 C.F.R. § 14.636 contending "that § 5904(c)(1) as amended under the AMA must apply to all claims regardless of when a decision issued, and that § 14.636(c)(2)-(3), which limit the applicability of amended § 5904(c)(1) to claims with a decision issued on or after the AMA's effective date, are invalid." *MVA*, 7 F.4th at 1132. The Federal Circuit noted that the petitioner had "fail[ed] to point to an example claim in which it, under its interpretation, could receive retroactive effect." *Id.*

The operative language of the prior caselaw was essentially the same, including in *Stanley v. Principi*, 283 F.3d 1350 (Fed. Cir. 2002), and *Carpenter v. Nicholson,* 452 F.3d 1379 (Fed. Cir. 2006)—both of which were discussed by this Court—as well as in *Jackson v. Shinseki*, 587 F.3d 1106 (Fed. Cir. 2009), which all involved a prior version of 38 U.S.C. § 5904(c)(1), as enacted in the 1988 Veterans Judicial Review Act (VJRA), and contained a different fee-triggering event. The VJRA version established the fee-triggering event as the initial Board decision "in the case." As summarized by the Federal Circuit in *Jackson, Carpenter* held that a motion for revision based on CUE in a final VA decision brought for the purpose of establishing an effective date earlier than previously assigned was not a new case for purposes of 38 U.S.C. § 5904(c),

because the effective date was an element of the prior claim, and a fee-triggering event *had already occurred* on that element in the prior proceedings. *Jackson,* 587 F.3d at 1111. However, that ruling was qualified in the VA regulations implementing the 2006 amendment to 38 U.S.C. § 5904(c)(1) (enacted post-*Carpenter*), wherein VA provided that a motion for revision based on CUE would not require a separate fee-qualifying event *only if* the claimant had filed an NOD in the prior proceedings. 72 Fed. Reg. 29852, 29868, 29876 (May 22, 2008) (final rule). The pre-AMA version of 38 U.S.C. § 5104(c)(1), *i.e.*, the legacy fee statute, specifies the fee-triggering event as the filing of an NOD with respect to the case. Although *Carpenter* and *Stanley*, as explained by this Court and by the Federal Circuit in *MVA*, are important in establishing the "case," in both *Carpenter* and *Stanley* the fee-triggering event occurred before the services were provided for which fees were permitted.

C. The Plain Language of the Pre-AMA Version of 38 U.S.C. § 5904(c)(1) Prohibits Fees in the Situation Before the Court

The Secretary disagrees with the Court's conclusion that "[t]here simply is no doubt that appellant is entitled to a fee as far as the statute goes." *Held*, No. 21-8048, 2023 WL 7503091, at *4. In particular, the Court's reading gives retroactive effect to the statute by saying that it authorizes the charging of fees for services that were provided before the amended statute is applicable. However, even under the Court's statutory construction, up until the moment that the

December 2019 RO decision was issued, the legacy version of 38 U.S.C. § 5104(c)(1) prohibited the charging of fees. It is undisputed that Mr. Dojaquez did not provide any services after December 2019 with respect to the case. Section 5904(c) requires among other things, the existence of a contract between the attorney and claimant, the submission of that contract to VA, and that the attorney provided "services" to the claimant. 38 U.S.C. § 5904(c)(1). Thus, the AMA-amended version of 38 U.S.C. § 5904 would only apply once VA had issued the December 2019 decision; however, at that point, services had already been provided and the charging of fees was not permitted. Simply put, there were no services provided by Mr. Dojaquez for which fees were permitted to be charged in this case.

Finally, to clarify any confusion from the oral argument, *see* OA at 54:16-56:37, the legacy fee statute would not apply to prohibit fees for any services provided after the December 2019 decision. Under the AMA fee statute, fees could be charged for services provided thereafter, *cf.* OA at 54:48 (Judge Allen's hypothetical under which the RO in December 2019 denies CUE and the hypothetical Veteran challenges the December 2019 denial). But that is not pertinent to the matter on appeal. The current AMA fee statute (and, prior to being invalidated in *MVA*, 38 C.F.R. 14.636(c)(1)) would permit fees after a new decision on CUE. The provisions of 38 C.F.R. § 14.636(c)(2)(ii) only address whether charging fees is permitted at an earlier point, *i.e.*, earlier than the new AMA

decision on CUE. Here, the attorney is not seeking fees for work performed after December 2019, which would be governed by and permitted by the AMA fee statute.

D. Conclusion

Panel reconsideration is warranted because the Court's November 14, 2023, decision overlooked or misunderstood the points of law or fact discussed herein. *See* VET. APP. R. 35(a)(1).

WHEREFORE, the Secretary respectfully moves for panel reconsideration of its November 14, 2023, decision.

Respectfully submitted,

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