IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

SEAN A. RAVIN,

Appellant,

v.

ROBERT L. WILKIE,
Secretary of Veterans Affairs,

Appellee.

Vet. App. No. 16-2057

APPELLEE'S SUPPLEMENTAL MEMORANDUM OF LAW

On June 7, 2018, this Court issued an order permitting the parties to submit a supplemental memorandum of law addressing whether *Carpenter v. Principi*, 15 Vet.App. 64 (2001) (en banc), should be overruled. The Secretary's position remains unchanged: *Carpenter* should not be overruled. The Court correctly decided the matter in 2001, and subsequent statutory amendments did not undermine its holding. No other reason exists that should persuade this Court to take the drastic step of reversing settled precedent that requires a claimant's representative to offset fees awarded under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d), from fees payable under the provisions of 38 U.S.C. § 5904.

To the extent that Appellant has argued that *Carpenter* should be re-examined in light of two Fifth Circuit decisions issued in 2010, *Rice v. Astrue*, 609 F.3d 831 (5th Cir. 2010), and *Kellems v. Astrue*, 628 F.3d 215 (5th Cir. 2010), those cases dealt with attorney fee awards in cases brought by claimants seeking

benefits from the Social Security Administration and are inapposite here. As the Secretary argued in briefing and during oral argument before a panel of this Court, the Fifth Circuit's decisions in *Rice* and *Kellems* are neither binding nor applicable, because the statutory scheme governing attorney fees in the Social Security context is far different from the one applicable to veterans. The fee statute governing Social Security claims expressly distinguishes between administrative representations before the Commissioner of Social Security and representations of claimants before a judicial tribunal. *See* 42 U.S.C. § 406(a)(1) (providing for fees related to proceedings before the Commissioner); 42 U.S.C. § 406(b)(1)(A) (providing for fees for services "before the court"). Unlike the Social Security statute, however, 38 U.S.C. §§ 5904 and 7263 do not distinguish between work before the Secretary and work before a court. *Rice* and *Kellems* thus have no bearing on this Court's decision in *Carpenter*.

Nevertheless, the Secretary is compelled to inform the Court of pertinent developments since the parties' briefing and oral argument before a panel of this Court that involve the Fifth Circuit cases relied upon by Appellant. *See* VET. APP. R. 30(b); *Solze v. Shinseki*, 26 Vet.App. 299, 302-03 (2013) (emphasizing that all parties "'have a *continuing duty* to inform the Court of any development which *may conceivably affect* an outcome'" (quoting *Fusari v. Steinberg,* 419 U.S. 379, 391 (1975) (Burger, C.J., concurring) (emphasis added in original)). The Supreme Court has granted a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit in *Wood v. Comm'r of Soc. Sec.*, 861 F.3d 1197 (11th Cir. 2017),

cert. granted sub nom. Culberson v. Berryhill, 2018 U.S. LEXIS 3129 (U.S. May 21, 2018) (NO. 17-773). *Culberson* involves the review of a split amongst the Federal circuit courts of appeal as to whether the Social Security Act imposes a 25% cap on the aggregate amount of attorney's fees for agency and court proceedings. Under 42 U.S.C. § 406(a), an attorney may seek fees "[f]or representation of a benefits claimant at the administrative level," including based on a written fee agreement not to exceed the lesser of "25 percent of the total amount of such past-due benefits" or a prescribed dollar amount (currently $6000). *See* 42 U.S.C. § 406(a)(2)(A)(ii)(II) and (iii), as amended by the Omnibus Budget Reconciliation Act (OBRA) of 1990, Pub. L. No. 101–508, § 5106, 104 Stat. 1388 (1990); *see also* 74 Fed. Reg. at 6080 (Feb. 4, 2009) (raising the prescribed amount to $6000). Under 42 U.S.C. § 406(b), an attorney may seek fees for representation before a court "not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment." 42 U.S.C. § 406(b)(1)(A). If a court awards fees under the EAJA and approves fees under § 406(b), "the claimant's attorney must 'refund to the claimant the amount of the smaller fee,'" which can "effectively increase[] the portion of past-due benefits the successful Social Security claimant may pocket." *Gisbrecht v. Barnhart*, 535 U.S. 789, 796 (2002) (citation omitted). The question currently before the Supreme Court is whether fees subject to § 406(b)'s 25% cap include, as the Sixth, Ninth, and Tenth Circuits hold, only fees for representation in court

or, as the Fourth, Fifth (including *Rice*, 609 F.3d 831), and Eleventh Circuits hold, also fees for representation before the agency.

The Secretary emphasizes again that *Rice* and *Kellems* should have no bearing on this Court's decision in *Carpenter* because, unlike the Social Security statute, 38 U.S.C. § 5904 and 7263 do not distinguish between work before the Secretary and work before a court. Overall, the statutory scheme governing attorney fees in the Social Security context is far different from the one applicable to veterans. But, given that the Supreme Court may overrule *Rice,* at least in part, the Secretary is compelled to bring this matter to the Court's attention.

In sum, the Secretary's position remains that Appellant offers no persuasive rationale for revisiting this Court's en banc holding or reasoning in *Carpenter*, which is settled law. This Court has applied *Carpenter* and reaffirmed its holding regarding the offsetting of EAJA fees against contingency fees for the same work. *Mason v. Nicholson*, 20 Vet.App. 279, 290-91 (2006) ("[a]pplying the interpretation of 'same work' adopted by the en banc Court in *Carpenter*," holding that a fee agreement providing that an EAJA award will be added to the attorney's contingency fee was excessive and unreasonable); *see also Jackson v. Shinseki*, 23 Vet.App. 27, 34, 36 (2009) (extending the *Carpenter* principle to work performed before the Federal Circuit and work performed to obtain an EAJA fee). The *Carpenter* analysis remains sound, and Appellant offers no persuasive rationale for why it should be overturned.

The Secretary acknowledges that the amount of fees paid by the Department does not vary depending on whether the EAJA offset rule of *Carpenter* is retained or overruled. However, the Secretary has a strong policy interest in maximizing the amount of benefits that flow to veterans and beneficiaries. *See, e.g., Henderson v. Shinseki*, 562 U.S. 428, 441 (2011) (reiterating "the cannon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor" (quoting *King v. St. Vincent's Hospital,* 502 U.S. 215 (1991)). The EAJA offset rule of *Carpenter* effectuates that mandate and fulfills the intent of Congress in providing benefits to veterans. The alterative proposed by Appellant and amicus curiae would enhance the fees of attorneys at the expense of veterans and beneficiaries. Simultaneously, the costs associated with adjudicating attorney-fee cases would explode and the number of appeals resulting from attorney-fee determinations would proportionally increase, causing delay for all veterans. Therefore, the Secretary urges the Court to retain the bright-line standard set forth in *Carpenter*, which effectuates the intent of Congress in providing benefits to veterans and beneficiaries and avoids costly and time-consuming litigation about attorney-fee determinations.

WHEREFORE, Appellee respectfully requests that the Court reject Appellant's request to overrule its settled precedent and that the Court affirm the Board decision on appeal.

Respectfully submitted,

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