

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

<b>NETTIE CASEY,</b>	)	
	)	
Appellant,	)	
	)	
v.	)	Vet. App. No. 18-1051
	)	
<b>ROBERT L. WILKIE,</b>	)	
Secretary of Veterans Affairs,	)	
	)	
Appellee.	)	

**NOTICE TO THE COURT**

The Secretary of Veterans Affairs, Robert L. Wilkie, files this Notice to inform the Court of a development to the Secretary's position in this matter. See *cf. Solze v. Shinseki*, 26 Vet.App. 299, 301 (2013).

In this matter, the Secretary has argued that 38 U.S.C. § 5112 and 38 C.F.R. § 3.500 do not apply to a one-time payment, and thus are inapplicable to this case. The Secretary will continue to present this argument to the panel of Judges at oral argument.

In the interest of fairness and candor, however, the Secretary informs the Court of a development to the Secretary's position concerning the second question on the Court's December 20, 2018, Supplemental Briefing Order. The second question on the Court's December 2018 Order directed the parties to provide supplemental briefing addressing whether the payment here was "erroneous," assuming that the one-time payment is an "award" under § 5112(b)(10) and section 3.500(b)(2). See Court's December 20, 2018 Order at 1 ("Second, assuming the one-time payment is an 'award,' does the term 'erroneous' . . . contemplate a situation in which . . . the only error was VA's failure to withhold attorney's fees from the payment . . . ?").

The Secretary responded to the second question by arguing that, assuming the payment here is an “award” under § 5112 and section 3.500, it was not erroneous. See Secretary’s Memorandum of Law in Response to the Court’s Order (Sec. Resp.) at 7. The Secretary will continue to present this argument to the panel of Judges at oral argument.

In the alternative, the Secretary argued that, if the Court holds that the one-time payment here was an erroneous award, VA was not solely at fault for the error. *Id.* The Secretary stated, inter alia, that Appellant and her attorney were sent a July 2013 award letter, which did not list an attorney fee withholding. *Id.* at 8. The Secretary informs the Court that he no longer intends to argue that, pursuant to the July 2013 award letter, Appellant and her attorney knew or should have known that the attorney fee was not withheld. Rather, the Board did not explain why it relied on a part of the M21 to find that, if the attorney fee had been withheld, it would have been listed on the July 2013 award letter. See Record of Proceedings (R.) at 11 (citing M21-1, Part III, Subpart v, Chapter 2, Section B, Topic 1.b); see also Appellant’s Response to Secretary’s Memorandum of Law (arguing that the Board did not adequately explain why it found that the attorney fee withholding would have been included on the July 2013 award letter) (citing *Overton v. Wilkie*, 30 Vet.App. 257 (2018)).

As stated above, however, the Secretary continues to argue that § 5112 and section 3.500 do not apply to the one-time payment at issue here, and thus any inadequacy as to the fault adjudication is not dispositive.

**WHEREFORE**, the Secretary respectfully notifies the Court of the above, relevant development in this case.

Respectfully submitted,

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