No. 19-3317

In the

UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

APPELLANT'S REPLY BRIEF

Re

HUGH D. COX, JR.

Appellant,

versus

ROBERT L. WILKIE,

Secretary of Veterans Affairs,

Appellee.

KENNETH M. CARPENTER
Carpenter, Chartered
1525 Southwest Topeka Boulevard
Post Office Box 2099
Topeka, Kansas 66601
785-357-5251

Attorney for Appellant

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Summary of Rebuttal Arguments

It is crucial to attorneys as well as claimants that the statutory and regulatory scheme be addressed by this Court here in order to clarify and confirm that Congress as well as the Secretary have created separate tracks to address the issues of: (1) the eligibility of a veteran's attorney to charge and receive a fee based on a valid fee agreement to provide services to claimants; (2) what the requirements are to be entitled to a fee under § 5904(d), as distinguishable from the procedures for a review of the fee for excessiveness or unreasonableness; and (3) that the affording of the presumption of reasonableness is mandatory but rebuttable. This case is an unfortunate example of the lack of clear interpretation of the statutory and regulatory provisions providing a presumption that a fee called for in a fee agreement is reasonable unless rebutted must be afforded attorneys when their fee agreements are reviewed to determine if the fee called for in their fee agreement is reasonable.

Mr. Cox in his opening brief made seven averments of error. The Secretary's responsive brief makes three arguments which do not correspond sequentially to the averment of errors made by Mr. Cox. The focus of the Secretary's brief is premised on Mr. Cox's failure to address whether his discharge by Mr. Brinkley was for "good and adequate cause." Mr. Cox acknowledges that this Court's remand required the Board to address whether Mr. Brinkley had good cause for discharging Mr. Cox. It was a mistake

for this Court to have remanded. Mr. Cox is not precluded from challenging the Board's actions, based on this remand, as in excess of the Board's authority, a point the Secretary's brief demonstrates is not apprehended by the Secretary.

It is evident from the decision of the Board on remand from this Court that this Court's remand inadvertently caused the Board to erroneously assume that it had the authority, in the appeal of VA decision awarding fees to Mr. Cox from Mr. Brinkley's past due benefits, to nullify a fee agreement which was compliant with the requirements of 38 U.S.C. § 5904 if the Board found that Mr. Brinkley had discharged Mr. Cox for "good and adequate cause" and, further, that such a discharge by Mr. Brinkley authorized the Board to deny Mr. Cox **any fee** for the valuable services performed by Mr. Cox for Mr. Brinkley.

Therefore, the Secretary is gravely mistaken that Mr. Cox has misrepresented the issue on appeal or has failed to raise an argument as to the issue on appeal. The Secretary asserts that the only issue on appeal is that of *entitlement* to attorney fees under the terms of the attorney fee agreement executed between Mr. Cox and Mr. Brinkley. Mr. Cox disagrees. The Secretary complains that Mr. Cox made no argument as to his entitlement to fees under the express terms of the contract or any argument that the Board erred in any way in finding that he was discharged with good and adequate cause such that he is not entitled to fees – again, under the express terms of the contract he entered into. This complaint is meritless.

Mr. Cox's appeal presents substantive questions of law concerning the statutory and regulatory scheme regarding the Board's subject matter jurisdiction when this Court makes a "reasons or bases" remand, as well as the scope of its review of a decision of the Secretary on an attorney's eligibility to charge and receive a fee, as opposed to decisions on the reasonableness of the fee called for in a fee agreement. The Secretary appears to have forgotten that the Board in the decision appealed to this Court found that Mr. Cox was entitled to the fee called for in his fee agreement. The Secretary or his agent, the Office of the General Counsel, made a decision on the reasonableness of Mr. Cox's fee.

Mr. Cox has every right to challenge this Court's remand decision, which asked the Board on remand to address a matter not within the Board's authority to review. Mr. Cox, in appealing the Board's remand decision, has the right to challenge what the Secretary has indicated are the separate and distinct concepts of the validity of a fee agreement, the eligibility of an attorney to lawfully charge and receive a fee for services performed for a clamant, entitlement of an attorney to have his fee withheld and paid by the Secretary under § 5904(d), and the reasonableness of the fee called for in his fee agreement.

The Secretary mistakenly asserts that Mr. Cox's entire argument rests on what amount of fees would be reasonable, which is an issue not before the Court. The issue before this Court is controlled by Mr. Cox's averments of error. Each of the severable arguments presented by Mr. Cox's appeal come down to whether the Board's decision

on each of these issues was made in accordance with law.

I.

The Board's decision was not made in accordance with law and, therefore, must be set aside as unlawful.

The Secretary claims that the Board in its decision on appeal did not make a review for reasonableness. Understanding why the Secretary is mistaken in his assertion requires an agreement upon what is and what is not required by the statutory as well as regulatory scheme concerning fee agreements. It is necessary to begin with what Congress did and how it did what it did. Congress only speaks to attorney fees and fee agreements in the provisions of 38 U.S.C. § 5904. Congress has twice amended the provisions of 38 U.S.C. § 5904(c). The version of § 5904(c) in 2013, the date of VA's award of past due benefits to Mr. Brinkley, RBA 4196-4202, was the first amended version. However, because Mr. Cox's representation of Mr. Brinkley began in August 1996 for representation in an appeal to this Court, RBA 8514-8516, the original version of § 5904(c) applies. *See also* 38 C.F.R. § 14.636(c)(2) (2018). The Board in its decision made a favorable finding of fact, which this Court is bound by, that: "All three of the fee agreements executed by the Veteran [Mr. Brinkley] and H.C. [Mr. Cox] are valid." RBA 8-25 at 17. This favorable finding disposes of the question of whether the fee agreements entered into between Mr. Cox and Mr. Brinkley are valid.

However, because of this Court's remand decision, RBA 159-164, that is not the

end of the matter. First, because this Court is now reviewing a new Board decision, RBA 8-25, that does not mean that Mr. Cox is precluded from renewing his arguments from the prior appeal where this Court did not address them because this Court remanded based on the Secretary's concession of error. RBA 159-164 at 163. Mr. Cox is entitled to present those arguments again, as well as to renew his challenge to this Court's decision to remand and not affirm the 2015 Board decision and to challenge the Board's 2019 decision. In this regard, Mr. Cox has averred that the Board exceeded its authority on remand when it readjudicated the merits of Mr. Cox's entitlement to attorney fees.

Mr. Cox has presented in this appeal a question of law concerning the Board's scope of review based on this Court's "reasons or bases" remand. Specifically, the question is, "Is the Board permitted on remand to readjudicate the appeal as opposed to providing the missing reasons or bases?" There is no case law which addresses this question. Here, the Secretary determined that the fee agreement between Mr. Brinkley and Mr. Cox was valid and that the $58,586.30 withheld from the VA's award of past due benefits to Mr. Brinkley should be paid to Mr. Cox. RBA 4169-4171. This was the **only** decision made by the Secretary. The Board reviewed that decision and affirmed the Secretary's determination in the first instance. *See Disabled Am. Veterans* (DAV) *v. Sec'y of Veterans Affairs*, 327 F.3d 1339, 1346 (Fed. Cir. 2003)(the Board exceeds its jurisdiction and violates the statutory requirement that it provide a claimant "one review on appeal" when, absent a waiver, it issues a decision on an issue that was not previously decided

by the agency of original jurisdiction). Mr. Cox provided no such waiver and this Court's reasons or bases remand was not a waiver. Thus, the scope of the Board's readjudication on remand was only to provide an adequate statement of reasons or bases.

The significance of there being only one decision having been made by the Secretary is two fold. First, the Board cannot, as it did, readjudicate the merits of whether Mr. Cox's fee agreement is valid because the determination of the Board was the law of the case. The "law of the case" doctrine mandates that "questions settled on a former appeal of the same case are no longer open for review." *Browder v. Brown*, 5 Vet. App. 268, 270 (1993). The question of whether Mr. Cox's fee agreement was valid was decided by the Board and, on appeal, Mr. Brinkley only challenged the reasonableness of the fee and the Secretary's concession of error, RBA 159-164 at 163, was based on the Board's failure to address the *Scates* criteria, which is an issue of reasonableness and not the validity of Mr. Cox's fee agreement.

Second, the Board cannot adjudicate the issue of reasonableness, not only because the Secretary made no decision on the issue of reasonableness but, more importantly, Congress explicitly required that the Secretary review for reasonableness on his own motion or the request of the claimant, neither of which occurred here. *See* 38 U.S.C. § 5904(c)(3)(A). Furthermore, the Secretary has interpreted § 5904(c)(3)(A) to require that a motion or a request for review must be made within 120 days of VA's final action, which again did not occur here. *See* 38 C.F.R. § 14.636(i).

The Secretary, does not in his regulation identify with any specificity what action or decision constitutes "VA's final action." In this matter, there were two decisions which could have been VA's final action: first, VA's July 15, 2013 rating decision, which awarded Mr. Brinkley past due benefits (RBA 4196-4202) and second, VA's July 24, 2013, fee decision, which found Mr. Cox entitled to a fee based on a valid fee agreement. RBA 4169-4171. Regardless of which decision was the VA's final action in this case, neither the OGC upon its own motion nor Mr. Brinkley upon motion sought to review the fee called for in Mr. Cox's fee agreement for excessiveness or unreasonableness within the time limit imposed by the Secretary in § 14.636(i).

As a result, a lawful review for reasonableness could not have been made by the Board in the first instance because there never was the required motion for review for excessiveness or unreasonableness made under § 14.636(i). Thus, as a matter of law, a review was precluded by the Board because there had been no decision by the OGC, as the Secretary's agent, to implicate the Board's subject matter jurisdiction. Finally, without a decision, there was no notice of disagreement filed, no statement of the case provided and no appeal filed to the Board. Therefore, as a matter of law, the Board did not and could not have had subject matter jurisdiction to address the issue of reasonableness.

Furthermore, this Court's remand could not have created subject matter jurisdiction for the Board, even based upon a concession by the Secretary in the prior

appeal that remand is required for the Board to discuss the factors for determining the fee award for a discharged attorney laid out in *Scates v. Principi*, 282 F.3d 1362, 1366 (Fed. Cir. 2002), Appellee's Brief at 13-21. RBA 159-164 at 159. Furthermore, this Court's remand decision in Vet.App. No. 15-4356, which determined that the Board failed to provide an adequate statement of its reasons or bases for its finding that the intervenor was entitled to a fee award did not and could not have created subject matter jurisdiction in the Board, RBA 159-164 at 163, for the Board to address the issue of the excessiveness or unreasonableness of Mr. Cox's fee.

The Secretary's *post hoc* rationalization that the Board never discussed reasonableness, Sec.Brf., p. 20, is of no moment. As the Board correctly noted in its decision: "When determining the reasonableness of an attorney fee, the Board must consider both the regulatory factors and the *Scates* factors. *Lippman v. Shinseki*, 21 Vet. App. 184, 189-90 (2007)." Regardless, of the Secretary's erroneous assertion, this Court remanded to the Board for a reasonableness determination without subject matter jurisdiction.

Assuming without conceding that the Board possessed the subject matter jurisdiction to make a reasonableness determination, the determination made by the Board that Mr. Cox was not entitled to a fee was not made in accordance with law. This is true because the Board failed to consider and apply the statutory presumption that the fee of 20 percent, called for in Mr. Cox's fee agreement was reasonable unless and until

rebutted. Absent from the Board's decision on appeal is any reference to, acknowledgment of or consideration of the statutory presumption that a fee of 20 percent or less is to be presumed to be reasonable. *See* 38 U.S.C. § 5904(a)(5).

Although the Board did acknowledge that: "Generally, fees which do not exceed 20 percent of any past-due benefits awarded are presumed to be reasonable. 38 C.F.R. § 14.636(f) (2018)." RBA 8-25 at 18. The Board **did not** afford Mr. Cox the benefits of the statutory and regulatory presumption that his fee of 20 percent was presumptively reasonable. *See Routen v. West*, 142 F.3d 1434, 1440 (Fed. Cir. 1998), *cert. denied*, 525 U.S. 962, 119 S. Ct. 404, 142 L. Ed.2d 328 (1998) ("The presumption affords a party, for whose benefit the presumption runs, the luxury of not having to produce specific evidence to establish the point at issue. When the predicate evidence is established that triggers the presumption, the further evidentiary gap is filled by the presumption.").

The starting point of any review for the reasonableness of the fee called for in the agreement is whether the fee agreement calls for a fee of 20 percent or less, if so, the statutory and regulatory presumption must be afforded. But, the Board never afforded Mr. Cox with the benefit that his 20 percent fee was presumptively reasonable. This was a prejudicial error, since Mr. Cox was entitled to rely on the benefit of the presumption that the 20 percent fee called for in his fee agreement with Mr. Brinkley was reasonable.

Furthermore, Mr. Cox was entitled to the benefit of the statutory and regulatory presumption that his fee was reasonable until that presumption was rebutted by

establishing that there was clear and convincing evidence that a fee which did not exceed 20 percent of any past-due benefits awarded was not reasonable, which did not occur here. *See* 38 C.F.R. § 14.636(f). The Board's error in this case is compounded by the Board's erroneous determination that, because Mr. Brinkley "had good and adequate cause to discharge H.C. [Mr. Cox], H.C. [Mr. Cox] is not entitled to *quantum meruit* fees." Not only did the Board err by failing to afford Mr. Cox the benefit of the presumption of the reasonableness of his 20 percent fee, the Board also failed to establish that there was clear and convincing evidence that a fee which does not exceed 20 percent of any past-due benefits awarded was not reasonable, as required under § 14.636(f).

In so doing, the Board, in excess of its jurisdiction and contrary to law, concluded that Mr. Cox was not entitled to **any fees** and, therefore, a discussion as to whether the fees awarded were reasonable, or what amount of fees is reasonable, was unnecessary. RBA 8-25 at 19. This determination by the Board is contrary to the discussion of the Federal Circuit in its decision in *Scates*, *supra*, the reason for the Board's remand.

The Federal Circuit explicitly states:

> Ordinarily state law controls the attorney-client relationship. *See Baird v. Koerner*, 279 F.2d 623 (9th Cir. 1960). **Here, however, a federal statute provides for and governs the twenty percent contingent fee arrangement and the Secretary's payment of the fee to the attorney out of the proceeds of the past benefits awarded**. In that situation, should not federal rather than state law govern those aspects of the relationship?

Scates, 282 F.3d 1369. (emphasis noted). It follows, therefore, that since a federal statute provides for and governs the twenty percent contingent fee arrangement and the Secretary's payment of the fee to the attorney out of the proceeds of the past benefits awarded, 38 U.S.C. § 5904(d), that the Board as well as this Court are bound by § 5904(d) and not by a non-pertinent provision of the terms of the fee agreement regarding discharge for "good and adequate cause." Put another way, the question of the discharge of an attorney is beyond the scope of § 5904(d) and, to the extent it may be relevant to the reasonableness of a 20 percent fee, it is an issue which can **only be** addressed **after** the presumption of reasonableness has been rebutted, as required by § 14.636(f), when it has been established by clear and convincing evidence that a fee which does not exceed 20 percent of any past-due benefits awarded was not reasonable.

In other words, the statutory scheme created by Congress provides that the criteria for an attorney's eligibility to lawfully charge and receive a fee for service performed for a claimant are set out in 38 U.S.C. § 5904(c)(1). This criteria determines whether a fee agreement is valid. The requirements which determine the amount of the fee to be paid the attorney and whether the Secretary is to withhold and pay a fee to the attorney is set out in 38 U.S.C. § 5904(d). This criteria determines entitlement to the fee called for in the fee agreement. Congress codified the Secretary's regulatory presumption that a 20 percent fee is to be presumed to be reasonable in 38 U.S.C. § 5904(a)(5). The Secretary must set out the evidence necessary to rebut the presumption of

reasonableness of a 20 percent fee. The affording of the presumption that a 20 percent fee is reasonable and the rebutting of that presumption are required as a mandatory prerequisite to a review for reasonableness under the provisions of 38 U.S.C. § 5904(c)(3)(A). Congress mandated that a review of the fee called for in a fee agreement can be reviewed for excessiveness or unreasonableness but **only upon** a motion of the Secretary or a request by a claimant. The Secretary by regulation prescribed that a motion for review by the OGC or a request by a claimant, as contemplated under § 5904(c)(3)(A), must be made not later than 100 days from the date of VA's final action.

These statutory and regulatory provisions make clear that there is a specific requirement for the initiation of a review for reasonableness and the timeframe within which a motion by OGC or a request by the claimant must be made for a review to occur. *See* 38 C.F.R. § 14.636(i). It is also clear that OGC will limit its review and decision under this paragraph to the issue of reasonableness if another agency of original jurisdiction has reviewed the agreement and made an eligibility determination. *See* 38 C.F.R. § 14.636(c). An eligibility determination as well as a determination of reasonableness may be appealed to the Board by the party adversely affected by those decisions.

Mr. Cox is hopeful that this Court will be willing to take the time necessary to address these important questions of law. The Court should first determine whether the provisions of 38 C.F.R. § 14.636(f) apply to ascertain whether the issue of reasonableness

was decided by OGC. If this Court determines, as Mr. Cox believes is required, that neither OGC nor Mr. Brinkley ever made the required motion, then as a matter of law this Court can find that the question of the reasonableness of Mr. Cox was never within the jurisdiction of the Board or this Court.

This would allow this Court to vacate and set aside the Board's 2019 decision and affirm the Board's 2016 decision, which correctly determined that VA's fee decision of July 24, 2013, RBA 4169-4171, was correctly decided in determining that the fee agreement between Mr. Brinkley and Mr. Cox was valid and that the $58,586.30 withheld from the VA's award of past due benefits to Mr. Brinkley should be paid to Mr. Cox.

If, in the alternative, this Court decides that the issue of reasonableness was within the subject matter jurisdiction of the Board, then this Court must address the question of law presented by Mr. Cox's appeal concerning whether the statutory and regulatory presumption that a fee of 20 percent is reasonable is mandatory and must be afforded to attorneys or agents whose fee agreements provide for a fee of 20 percent or less unless rebutted. Further, this Court must further find that every review for reasonableness undertaken by OGC or the Board must afford the attorney or agent the benefit of the statutory and regulatory presumption and must further include whether, through an examination of the factors in § 14.636(e), it is established that there is or is not clear and convincing evidence that the fee at issue, which does not exceed 20 percent of any past-due benefits awarded, was or was not reasonable as a result.

The Board in this case, as has been shown, did not afford Mr. Cox with the benefit of the presumption that his 20 percent fee was reasonable and, as a consequence, never addressed whether the presumption had been rebutted. Therefore, the Board's decision on remand must be reversed because it was not made in accordance with law.

Finally, the Secretary's argument is that these issues of law need not be reached because Mr. Cox was not entitled to a fee under the terms of his own fee agreement. This argument while intuitive is not based in any provision of law or regulation. There is no basis for the Secretary through his agent the Board to review and to attempt to enforce the terms of the agreement between Mr. Brinkley and Mr. Cox. Congress has identified the two areas of review. The issue of entitlement to charge a fee and the issue of whether the fee called for in the fee agreement is excessive or unreasonable. The Board exceeds its authority to review when it reviews matters other than those specified by Congress.

Conclusion

This Court must conclude that the Board's decision in this matter has raised several very troubling questions of law. This Court must address as an issue of first impression the question of the interplay between the regulatory presumption of reasonableness of a fee and the discharge of an attorney. Furthermore, this Court must address the issue of first impression concerning whether there is a presumption of reasonableness for a discharged attorney or whether that statement in *Scates* is dicta.

Finally, this Court must address whether, as an issue of first impression, the limited provisions of 38 U.S.C. § 5904(c)(3)(A) permit the Board to deny a fee rather than ordering a reduction in the fee called for in the agreement.

Respectfully submitted by,

/s/Kenneth M. Carpenter
Kenneth M. Carpenter
Counsel for Appellant,
Hugh D. Cox, Jr.
Electronically filed on September 18, 2020