

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

<b>JOHN B. WELLS,</b>	)	
Petitioner,	)	
	)	
v.	)	Vet. App. No. 20-5221
	)	
<b>DENIS MCDONOUGH,</b>	)	
Secretary of Veterans Affairs,	)	
Respondent.	)	

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**JOHN B. WELLS,** )  
 Petitioner, )  
 )  
 v. ) Vet. App. No. 20-5221  
 )  
**DENIS MCDONOUGH,** )  
 Secretary of Veterans Affairs, )  
 Respondent. )

The Secretary files this response to the Court's August 12, 2021, order, wherein the Court directed the Secretary to provide statistical information reflecting the number of Veterans who challenge attorney fee determinations during the 60 day period following issuance of the fee determination letter.

Undersigned counsel contacted three parts of VA in an attempt to answer the question posed by the Court: the Board of Veterans Appeals (“Board”); the Veterans Benefits Administration (VBA); and the Office of General Counsel’s Benefits Law Group (BLG). The Secretary has attached each response. See Attachment A (Declaration from Christopher A. Santoro, Deputy Vice Chairman of the Board, and the “Exhibits” provided by the Board); Attachment B (Declaration of Jacqueline Imboden, Acting Assistant Director of the Policy and Procedures Staff of Compensation Service in VBA); Attachment C (Declaration of Christa A. Shriber, Deputy Chief Counsel (DCC), BLG). Each organization indicated to undersigned counsel that the exact data that the Court requested is not something

that is typically tracked, but worked with undersigned counsel to come up with the best response possible. Each response indicates its own limitations, and the methods undertaken to arrive at the data provided.

The Board's response indicated that 1,705 appeal records were created in the Veterans Appeals Control and Locator System (VACOLS) between 1998 (when VACOLS was created) that related to an attorney fee decision in the legacy appeal system, and 910 appeal records had been created for Notices of Disagreement (NODs) received seeking to appeal an issue related to an attorney fee decision in the modernized review system. See Attachment A at 1-2. The Board stated it was "unable to calculate how many of the legacy or modernized appeal records are based on NODs submitted by Veterans versus those submitted by attorneys." Attachment A at 2.

Acting Assistant Director Imboden indicated that VBA's Data Review staff reviewed Corporate data between August 2001 and September 2021, and searched for records fitting the form description "VA Form 10182 Notice of Disagreement" associated with an appeal, and used "a case-insensitive string search for the terms 'attorney fees' or 'fees' in that form." Attachment B at 1. This search "revealed 222 cases of Veterans and surviving spouses specifically contesting attorney fees." *Id.* Acting Assistant Director Imboden qualified that, "VBA does not specifically track attorney fee disputes in their Corporate data systems. Hence, I believe the search conducted revealed the best information available to VBA." *Id.* She further qualified that the total would not capture entries

where the words “attorney” or “fees” may have been misspelled, nor any entries that would include synonyms for those words. *Id.* “Consequently,” she concluded, “and because VBA’s Corporate database is not currently configured to specifically track attorney fee disputes, that total is in all probability lower than the actual number of claimants who challenged attorney fee determinations to VBA during the 60-day period following issuance of an attorney fee determination letter.” *Id.* at 1-2.

DCC Shriber provided the number of cases at BLG that involved attorney fee disputes that were referred to BLG’s Accreditation, Discipline, and Fees program. See Attachment C. By way of limitation, she added that the disputes may encompass disputes within the 60 days of an attorney fee eligibility determination, or longer (citing to 38 C.F.R. § 14.636(i) (which allows 120 days for motions to the Office of General Counsel to review fee agreements)), and that the data was obtained through a manual count and reflected “approximate” numbers. *Id.* DCC Shriber broke down the attorney fee disputes logged in BLG’s records by fiscal year (FY) dating back to FY 2017. See Attachment C. She gave the following numbers: 202 in FY 2017; 167 in FY 2018; 120 in FY 2019; 129 in FY 2020; and 189 in FY 2021 (through September 14, 2021). See *id.*

The Secretary respectfully submits this response to the Court’s order and attached documents.

**WHEREFORE**, the Secretary responds to the Court’s August 12, 2021, order, and requests that the Court dismiss, or deny, the instant petition.

Respectfully submitted,

**RICHARD A. SAUBER**

General Counsel

**MARY ANN FLYNN**

Chief Counsel

/s/ Edward V. Cassidy, Jr.

**EDWARD V. CASSIDY, JR.**

Deputy Chief Counsel

/s/ Nathan Paul Kirschner

**NATHAN PAUL KIRSCHNER**

Senior Appellate Counsel

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Attorneys for Respondent,

Secretary of Veterans Affairs

# ATTACHMENT A

JOHN B. WELLS )  
 )  
 Petitioner, )  
 )  
 v. ) Vet. App. No. 20-5221  
 )  
 DENIS MCDONOUGH, )  
 Secretary of Veterans Affairs, )  
 )  
 Respondent. )

I, Christopher A. Santoro, pursuant to 28 U.S.C. § 1746, declare under the penalty of perjury the following:

- 16

4. A total of 910 appeal records have been created in Caseflow as of September 1, 2021 for NODs received seeking to appeal an issue related to an attorney fee decision in the modernized review system. *See* Exhibit C.
5. Statistics are provided beginning in 1998, at which time the tracking of specific appeal issues began in VACOLS.
6. The Board is unable to calculate how many of the legacy or modernized appeal records are based on NODs submitted by Veterans versus those submitted by attorneys.
7. Attached is a printout of the VACOLS screen for the Issue Distribution Report for legacy appeal records that include an “Attorney fees” issue (Exhibit A); a printout of a sample VACOLS screen displaying the “Issues” tab, reflecting the three types of “Attorney fees” issues captured in the Issue Distribution Report (Exhibit B); and a printout of data compiled from Caseflow reflecting each of the modernized appeal records containing the words “attorney fees” in the description of the issue as adjudicated by the Agency of Original Jurisdiction (column E) and/or the description of the issue as adjudicated by the Board (column F) (due to its length, only the first and last pages of the report have been included; columns containing personally identifiable information have been removed) (Exhibit C).

I certify under the penalty of perjury that the foregoing is true and correct.

Executed on the 8th day of September 2021.

A handwritten signature in black ink, appearing to read "Christopher A. Santoro". The signature is stylized with a large initial "C" and a long horizontal stroke at the end.

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CHRISTOPHER A. SANTORO



## EXHIBIT A

**Board of Veterans' Appeals  
Issue Distribution Report  
From: 01/01/98 To: 09/01/21**

**9/1/2021**

<u>Program</u>	<u>Issue</u>	Disposition of Issues					<u>Open</u>	<u>Total</u>
		<u>Allowed</u>	<u>Denied</u>	<u>Remand</u>	<u>Field Disp</u>	<u>Other</u>		
Other programs	Attorney fees	118	221	161	1077	100	0	1705
<b>Other programs</b>	<b>Totals</b>	<b>118</b>	<b>221</b>	<b>161</b>	<b>1077</b>	<b>100</b>	<b>0</b>	<b>1705</b>
<b>Totals:</b>		<b>118</b>	<b>221</b>	<b>161</b>	<b>1077</b>	<b>100</b>	<b>0</b>	<b>1705</b>

## EXHIBIT B

# VACOLS Appeal Screen

File Processes Utilities Help

Appeal Id: [REDACTED] Name: [REDACTED] RO: RO17 Status: ACT

Docket
 Dispatch
 PriorLocs
 Address
 Vet Info
 Attachment
 Diary(0)/Opinion(0)

CAVC
 DAS(0)
 Mail(0)
 Oth Docs
 RemRea
 Issues(3)
 Hearing
 Mot
 CC

<u>Program</u>	<u>Issue</u>	<u>Levels 1-3</u>	<u>Disposition / Date</u>
1 Other programs	Attorney fees	Failure to withhold fees	
2 Other programs	Attorney fees	Eligibility	
3 Other programs	Attorney fees	Reasonableness	

## EXHIBIT C

	A	B	C	D
1	appeal_id	docket_type	receipt_date	req_issues_nonrating_issue_category
2	13695	evidence_submission	2019-07-01	Contested Claims (other than apportionment)
3	48347	direct_review	2019-10-28	Contested Claims (other than apportionment)
4	90363	direct_review	2020-06-02	Contested Claims (other than apportionment)
5	103028	direct_review	2020-08-13	Contested Claims - Attorney fees
6	105980	direct_review	2020-08-27	Contested Claims - Attorney fees
7	48260	hearing	2019-11-13	Contested Claims (other than apportionment)
8	48376	evidence_submission	2019-09-25	Contested Claims (other than apportionment)
9	57059	direct_review	2020-02-04	Contested Claims (other than apportionment)
10	74782	direct_review	2020-04-28	Unknown issue category
11	78168	evidence_submission	2020-03-23	Contested Claims (other than apportionment)
12	81754	direct_review	2020-05-05	Contested Claims (other than apportionment)
13	83470	direct_review	2020-05-06	Contested Claims - Attorney Fees
14	83548	direct_review	2020-05-06	Contested Claims (other than apportionment)
15	139937	direct_review	2021-03-04	Contested Claims - Attorney fees
16	140736	direct_review	2021-03-04	Contested Claims - Attorney fees
17	146964	evidence_submission	2021-03-09	Contested Claims - Attorney fees
18	152506	direct_review	2021-02-12	Contested Claims - Attorney fees
19	156048	direct_review	2019-05-28	Contested Claims - Attorney fees
20	160409	direct_review	2021-05-14	Contested Claims (other than apportionment)
21	160460	direct_review	2021-05-13	Contested Claims (other than apportionment)

	E	F
1	req_issues_nonrating_issue_description	dec_issues_description
2	Reasonableness of attorney fees	
3	Improper calculation of attorney fees	Entitlement to attorney fees from past due benefits associated with a June 2019 and an August 2019 decision review officer decision is denied.
4	Improper calculation of attorney fees	
5	Improper calculation of attorney fees	
6	Improper calculation of Attorney fees	
7	IMPROPER CALCULATION OF ATTORNEY FEES	
8	Improper calculation of attorney fees	
9	Withholding of attorney fees	
10	Entitlement to attorney fees	An overpayment of Department of Veterans Affairs (VA) disability benefits in
11	Improper calculation of attorney fees	
12	IMPROPER CALCULATION OF ATTORNEY FEES	
13	Entitlement to attorney fees.	
14	Improper Calculation Attorney Fees	
15	Improper calculation of attorney fees	
16	Improper calculation of attorney fee	
17	Attorney fee decision dated November 27, 2020 granted attorney fees to the veteran's Agent/Attorney.	
18	the award of past-due attorney fees in the amount of \$16,885.98 to	
19	Entitlement to attorney fees	The issue of entitlement to attorney fees based on past-due benefits awarded in an August 2018 Board decision and effectuated in an October
20	Improper calculation of attorney fees	
21	Reasonableness of attorney fee determination	

	A	B	C	D
902	150280	direct_review	2021-04-06	Contested Claims - Attorney fees
903	150777	direct_review	2021-03-09	Contested Claims - Attorney fees
904	153776	direct_review	2021-04-14	Contested Claims - Attorney fees
905	155098	direct_review	2021-04-22	Contested Claims - Attorney fees
906	155346	evidence_submission	2020-09-09	Contested Claims - Attorney fees
907	160479	direct_review	2021-03-29	Contested Claims (other than apportionment)
908	162625	direct_review	2020-12-03	Contested Claims - Attorney fees
909	167871	direct_review	2021-06-22	Contested Claims - Attorney fees
910	176738	direct_review	2020-06-25	Contested Claims - Attorney Fees
911	178596	direct_review	2021-08-13	Contested Claims - Attorney Fees



	E	F
902	Improper calculation of attorney fees	
903	correspondence-attorney fees	
904	Improper calculation of attorney fee	
905	Improper calculation of attorney fees	
906	Entitlement to attorney fees	
907	Entitlement to attorney fees	
908	Entitlement to attorney fees	
909	Improper calculation of attorney fees	
910	Entitlement to attorney fees	
911	Improper Calculation of Attorney Fees	

# ATTACHMENT B

IN THE UNITED STATES COURT  
OF APPEALS FOR VETERANS CLAIMS

JOHN B. WELLS	)	
	)	
Petitioner,	)	
	)	
v.	)	Vet. App. No. 20-5221
	)	
DENIS MCDONOUGH,	)	
Secretary of Veterans Affairs,	)	
	)	
Respondent.	)	

DECLARATION OF JACQUELINE IMBODEN

I, Jacqueline Imboden, pursuant to 28 U.S.C. § 1746, declare under the penalty of perjury the following:

1. I am Acting Assistant Director of the Policy and Procedures Staff of Compensation Service in the Veterans Benefits Administration (VBA), in the Department of Veterans Affairs (VA). As such, I am among those responsible for the disability compensation program under 38 C.F.R. Part 3.
2. This declaration is provided in response to a request of the United States Court of Appeals for Veterans Claims (Court), dated August 12, 2021, directing the Secretary to provide statistical information reflecting the number of Veterans who challenge attorney fee determinations during the 60-day period following issuance of the attorney fee determination letter.
3. On September 16, 2021, VBA's Data Review staff reviewed the corporate data available from August 2001 to September 15, 2021. The Data Review staff searched for records fitting the form description "VA Form 10182 Notice of Disagreement" associated with an appeal, and used a case-insensitive text string search for the terms "attorney fees" or "fees" in that form. The search revealed 222 cases of Veterans and surviving spouses specifically contesting attorney fees. VBA does not specifically track attorney fee disputes in their Corporate data systems. Hence, I believe the search conducted revealed the best information available to VBA.
4. The total provided above in paragraph 3 does not capture Corporate database entries where the words "attorney" or "fees" may have been misspelled. Nor does it capture any corporate data base entries that may include synonyms for "attorney" or "fees." Consequently, and because VBA's Corporate database is not currently configured to

specifically track attorney fee disputes, that total is in all probability lower than the actual number of claimants who challenged attorney fee determinations to VBA during the 60-day period following issuance of an attorney fee determination letter.

I certify under the penalty of perjury that the foregoing is true and correct.

Executed this 17<sup>th</sup> day of September 2021.

Jacqueline R.

Imboden 100481

Digitally signed by Jacqueline R.  
Imboden 100481  
Date: 2021.09.17 14:12:04 -04'00'

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JACQUELINE IMBODEN

# ATTACHMENT C

### **Certification of Custodian of Records**

I, Christa A. Shriber, am employed by the Department of Veterans Affairs' (VA) Office of General Counsel (OGC), and my official title is Deputy Chief Counsel for the Benefits Law Group. I am charged with overseeing the day-to-day operations of VA's Accreditation, Discipline, and Fees program. I am the custodian of records for the program and I do hereby certify that the numerical data herein was obtained through a manual count of the fee matters within OGC's data system, GCLAWS, and reflects the approximate number of fee reasonableness matters that were entered into the OGC's data tracking system during the specified period of time either after being referred to OGC by the Veterans Benefits Administration (VBA) or after being filed directly with OGC by the claimant. The matters may encompass disputes within 60 days of VBA's attorney fee eligibility determination or longer, see e.g., 38 C.F.R. § 14.636(i) (allowing 120 days for motions to OGC to review fee agreements).

- In fiscal year 2021 (through September 14, 2021) there were approximately 189 fee reasonableness matters logged into GCLAWS.
- In fiscal year 2020, there were approximately 129 fee reasonableness matters logged into GCLAWS.
- In fiscal year 2019, there were approximately 120 fee reasonableness matters logged into GCLAWS.
- In fiscal year 2018, there were approximately 167 fee reasonableness matters logged into GCLAWS.
- In fiscal year 2017, there were approximately 202 fee reasonableness matters logged into GCLAWS.

I declare under penalty of perjury that the foregoing statement is true and correct.

Signature: *Christa A. Shriber* Christa A. Shriber 106315 Digitally signed by Christa A. Shriber 106315  
Date: 2021.09.17 09:55:00 -04'00'  
Christa A. Shriber  
Deputy Chief Counsel for the Benefits Law Group

Date: Friday, September 17, 2021