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

ROBERT B. GOSS,
Appellant,

v.

Vet.App. No. 21-0442

DENIS McDONOUGH,
Secretary for Veterans Affairs,
Appellee.

**MR. GOSS'S OPPOSED MOTION TO SUSPEND THIS COURT'S RULE
ON MOTIONS FOR RECONSIDERATION**

Pursuant to Rules 2 and 27, Mr. Goss requests that the panel suspend this Court's Rule 35 and permit him to seek reconsideration by the panel of its September 19, 2022 Order dissolving the panel in this case. In support of his motion asking that this Court suspend the requirements of U.S. Vet. App. Rule 35 which requires a dispositive order as a predicate for a motion for reconsideration, he states as follows:

1. Pursuant to Rule 27(a)(5), Mr. Goss's counsel has contacted counsel for the Secretary regarding whether this motion is opposed and, if so, whether a response in opposition will be filed by the Secretary. Counsel for the Secretary indicated that he is opposed but has not yet

determined whether he will respond but reserves the right to do so.

2. Mr. Goss believes that the based on the content of the dissent to this Court's September 19, 2022 Order dissolving the panel in this case was based upon a misunderstanding of the position of the parties concerning the parties characterization of 38 C.F.R. § 14.636(i) as jurisdictional.
3. As Mr. Goss understood the Secretary's notice of change of position, he was agreeing with Mr. Goss's argument that the Board did not have jurisdiction to determine the reasonableness of attorney fees because under 38 U.S.C. § 5409 and 38 C.F.R. § 14.636(i), the Office of General Counsel—not the Board— **has the authority to consider reasonableness in the first instance.** Secretary's August 23, 2022 Notice, p. 1. (emphasis added).
4. Mr. Goss's argument was that in order for the Board to possess jurisdiction of a decision under § 14.636(i) there must have been a decision by the Office of General Counsel made pursuant to § 14.636(i), in the first instance. There was no such decision by the Office of General Counsel in this case.
5. Thus, the position of Mr. Goss and that of the Secretary as expressed in his August 23, 2022 Notice are not contrary to this Court's panel decision in *Hall v. McDonough*, 34 Vet.App. 329, 333 (2021).

6. Additionally, the reason that Mr. Goss did not cite this Court's decisions in *Cox v. McDonough*, 34 Vet.App. 112, 123 (2021) and *Lippman v. Shinseki*, 23 Vet.App. 243, 256 (2009) was because both cases were premised on the Board having jurisdiction under the original version of 38 U.S.C. § 5904(c)(2). Under that version of the statute Congress provided original jurisdiction to the Board to review fee agreements in the first instance for reasonableness. As a result, there was no need for Mr. Goss to address the question of the reasonableness of the fee because after Congress amended the statute, the Secretary, and not the Board was responsible in the first instance to address the question of reasonableness of the fee. Because *Cox* and *Lippman* were based upon the original version of the statute, these cases were not applicable in this appeal.
7. The dissent observes correctly that neither party has cited any cases addressing the continued vitality of those cases or the interplay of the principles involved with the current statute and regulation, and none are evident. Court's September 19, 2022 Order, pp. 3-4. Until, the Secretary's notice of his changed position, there was no need to cite these cases or discuss their continued vitality. Now, that the Secretary has changed his position, further briefing of these issues is required to

the panel because these are matters which can not be addressed by a single judge. For this reason the Court should grant the motion to suspend this Court's rule which limits motions for reconsider.

8. Mr. Goss asks that this Court, pursuant to U.S. Vet. App. Rule 2, to suspend this Court's Rule 35 and permit him to seek reconsideration by the panel of it September 19, 2022 Order dissolving the panel in this case.
9. In light of the above, this matter needs to remain with a panel. The issues which remain are not issues of relative simplicity or are addressed by existing case law. Based upon the Secretary's change in position this appeal requires a panel to address issues which have not been briefed by the parties.
10. As a result, of the Secretary's change in position, a panel is required to address whether the Board has jurisdiction to address the issue of reasonableness of a fee when the only decision of the Secretary has been on the issue of entitlement to a fee. Under the benchmarks set out in *Frankel v. Derwinski*, 1 Vet.App. 23 (1990), this matter requires panel consideration.

WHEREFORE, Mr. Goss prays that this Court will suspend this Court's Rule 35 and permit him to seek reconsideration by the panel of it September 19, 2022

Order dissolving the panel in this case. Mr. Goss believes that reconsideration is in the interest of judicial economy and efficiency to avoid a single judge disposition before a motion for reconsideration by the panel could be filed by Mr. Goss.

Respectfully Submitted,

/s/Kenneth M. Carpenter

Kenneth M. Carpenter

Counsel for Robert B. Goss

Electronically filed on September 30, 2022.