

Kenneth M. Carpenter
CARPENTER, CHARTERED
1525 Southwest Topeka Boulevard
Post Office Box 2099
Topeka, Kansas 66601-2099
(785) 357-5251

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

ROBERT B. GOSS,

Appellant,

v.

DENIS McDONOUGH,
Secretary of Veterans Affairs,

Appellee.

Vet.App. No. 21-0442

Motion for Panel Decision

Pursuant to Vet.App. R. 35(b), Appellant, Robert B. Goss, respectfully moves for a decision by a panel of the Court. In accordance with Vet.App. R. 35(e) a panel decision is required because the single judge decision misunderstood that the Board had jurisdiction in the first instance to consider Mr. Casey's appeal of VA's decision that Mr. Goss was entitled to the fee called for in their fee agreement. Mr. Goss's appeal to this Court was required because, as conceded by the Secretary, the Board exceeded its jurisdiction by addressing the issue of reasonableness. Therefore, a

panel decision is also required because the single judge decision misunderstood that this Court lacked jurisdiction over Mr. Goss's appeal because the Board lacked jurisdiction.

A panel decision is required to establish binding precedent on the particular points of law regarding the Board's jurisdiction to consider a claimant's appeal of VA's decision to award of attorney fees and whether the Board loses its jurisdiction when it exceeds that jurisdiction by addressing an issue not addressed by the Secretary in the first instance. A panel decision is also required to clarify this Court's jurisdiction to consider an appeal by the attorney of a Board decision which found entitlement to fees but then reduced those fees unlawfully.

The Case

On September 30, 2011, the VA submitted a fee decision which found Mr. Goss entitled to a fee which was withheld from Mr. Casey's past due benefits based on VA's September 20, 2011 rating decision. RBA 2046-2047. On October 5, 2011, Mr. Casey submitted to VA a notice of disagreement with VA's September 30, 2011 fee decision. RBA 2025 and 2033. On February 15, 2012, VA processed payment to Mr. Goss for his attorney fees. RBA 1645. On October 11, 2012, VA submitted a statement of the case. RBA 1618-1632. The decision made by VA in its statement of the case was that Mr. Casey's claim was denied due to a legal contract/fee agreement with Mr. Goss. RBA 1631. On November 7, 2012, Mr. Casey signed a VA Form 9

to complete his appeal and the only basis for his appeal was that there was not a valid 21-22a. RBA 1611-1617. The Board found that the overall evidence supports a finding that Mr. Goss was eligible for an award of attorney fees based on the past-due benefits granted in the September 2011 and February 2012 rating decisions. RBA 11. The Board erroneously found that while Mr. Goss met the requirements of eligibility for attorney fees, the payment to Mr. Goss of those fees would be unreasonable. RBA 16.

As a result, the Board **did have jurisdiction** and decided the question of whether Mr. Goss was, as VA's fee decision found, entitled to have his fee withheld from Mr. Casey's award of past due benefits. The Board **did not** have the authority to address the issue of the reasonableness of Mr. Goss's fee in the first instance. In so doing, the Board exceeded its jurisdiction. As a result this Court had jurisdiction over Mr. Goss's appeal because he was adversely affected by the Board's clear error of law in exceeding its jurisdiction.

ARGUMENTS IN SUPPORT OF THE NEED FOR A PANEL DECISION

I.

A Panel is required to address the point of law of the difference between the Board exceeding its jurisdiction and the Board having no jurisdiction.

The appeal taken by Mr. Casey was from VA's fee decision that Mr. Goss's fee agreement was valid and that the Secretary would withhold and pay the fee called for

in the fee agreement between Mr. Casey and Mr. Goss. Mr. Casey filed a timely appeal, VA issued a statement of the case in response and Mr. Casey completed his appeal. Mr. Casey's appeal was premised upon the assertion that the VA Form 21-22a executed by both he and Mr. Goss was invalid. VA in the first instance and the Board on appeal found Mr. Casey's assertion to be without merit. The Board's jurisdiction is limited to deciding appeals with respect to matters that have been the subject of a decision by the regional office. *See Bernard v. Brown*, 4 Vet.App. 384, 391 (1993). In this matter, there was a decision by the regional office which was a fee decision that Mr. Goss was entitled to the fee called for in his fee agreement. Mr. Casey appealed that VA fee decision by filing a timely NOD. *See Buckley v. West*, 12 Vet. App. 76, 82 (1998)(Board's jurisdiction derives from claimant's NOD). When a matter is properly appealed to the Board, as was done in this case – Mr. Casey filed an NOD and VA Form 9 appealing whether he was obligated to pay Mr. Goss's attorney fee – the Board is vested with jurisdiction to review “[a]ll questions in a matter which under section 511(a) of [title 38] is subject to a decision by the Secretary.” 38 U.S.C. § 7104(a). However, no other matters which were not subject to a decision by the Secretary should be reviewed by the Board.

In this case, the only matter on appeal was whether Mr. Casey was obligated to pay Mr. Goss's attorney fee as was decided by the Secretary and subsequently by the Board. The Board exceeded its jurisdiction by addressing a matter which was not the

subject of a decision by the Secretary that being the matter of the reasonableness of the fee charged Mr. Casey by Mr. Goss. The record in this case is undebatable.

The Secretary through his General Counsel made no decision that the fee called for in Mr. Goss's fee agreement was unreasonable and there was no appeal of such a decision by either Mr. Casey or Mr. Goss. Thus, as a matter of law, the Board could not have lawfully addressed a matter which was not subject to a decision by the Secretary. The Board in its decision explicitly acknowledged:

R.B.G.'s attorney is correct that the Veteran in this case did not move for review of the fee agreement in accordance with the procedures set forth in 38 C.F.R. § 14.636(i), which provides that "[b]efore the expiration of 120 days from the date of the final VA action, the Office of the General Counsel may review a fee agreement between a claimant or appellant and an agent or attorney upon its own motion or upon the motion of the claimant or appellant." 38 C.F.R. § 14.636(i) (2017). The Board also acknowledges that it no longer has the authority to, upon its own motion, review a fee agreement and order a reduction in the fee called for in the agreement if the Board finds that the fee is excessive or unreasonable. See Veterans Benefits, Health Care, and Information Technology Act of 2006, Pub. L. No. 109-461 (amending 38 U.S.C. § 5904(c) by removing Board's authority to review fee agreements for reasonableness upon its own motion).

RBA 13. (emphases added). Nevertheless the Board proceeded to unlawfully address and decided an issue which was not subject to a decision by the Secretary in excess of its statutory authority.

Pertinent to this motion, the Board did have jurisdiction and indeed the obligation to decide the issue appealed by Mr. Casey which was whether Mr. Goss was entitled to the fee called for in his fee agreement under 38 U.S.C. § 5904(d). This issue was the subject of a decision by the Secretary over which the Board had jurisdiction to address. The Board in addressing the only issue over which it had jurisdiction made the following favorable finding of fact, a finding which this Court is bound:

The Board finds that the overall evidence supports a finding that Attorney R.B.G. [Mr. Goss] was eligible for an award of attorney fees based on the past-due benefits granted in the September 2011 and February 2012 rating decisions.

RBA 11. This Court is not permitted to reverse findings of fact favorable to a claimant made by the Board pursuant to its statutory authority. *See* 38 U.S.C. § 7261(a)(4) (as amended by the Veterans Benefits Act of 2002, Pub. L. No. 107-330, § 401, 116 Stat. 2820, 2832 (Dec. 6, 2002) (providing for Court to reverse or set aside only findings of fact “adverse to the claimant”) *See also Medrano v. Nicholson*, 21 Vet. App. 165, 170 (2007). Because this matter was a simultaneously contested appeal under 38 U.S.C. § 7105A, both Mr. Casey and Mr. Goss were claimants. As a result, the Board had subject matter over Mr. Casey’s appeal of VA’s fee decision and this Court had jurisdiction over Mr. Goss’s appeal of the Board’s adverse decision.

II.

A Panel is required to address the point of law regarding the difference between the predicate for the Board's jurisdiction and the predicate for this Court's jurisdiction.

The single judge memorandum decision overlooked and misunderstood the difference at law between the predicate for Board jurisdiction and the predicate for this Court's jurisdiction. As set out in the preceding argument, the predicate for Board jurisdiction is derived from the filing of an NOD with a decision of the Secretary. *See Buckley*, 12 Vet. App. 82. As a result, when Mr. Casey filed his NOD with the decision of the Secretary that Mr. Goss's fee agreement was valid and the Secretary was obligated to withhold his fee from Mr. Casey's award of past due benefits under § 5904(d). Therefore, the predicate for the Board's jurisdiction was established as a matter of law. When the single judge memorandum decision concluded that the Board lacked jurisdiction, the single judge was incorrect as a matter of law. The Board had, however, independently erred by exceeding its jurisdictional authority by addressing the issue of the reasonableness of Mr. Goss's fee that had not been the subject of a decision by the Secretary and no NOD on that issue had been filed by either party. However, the Board's predicate for its jurisdiction had been met when Mr. Casey filed his NOD with the Secretary's decision that Mr. Goss was entitled payment of the attorney fee agreed upon by Mr. Casey under § 5904(d). Thus, the single judge memorandum decision erroneously

concluded that the Board lacked jurisdiction.

In addressing this Court's jurisdiction, the single judge memorandum decision correctly noted that this Court's jurisdiction "is premised on and defined by the Board's decision concerning the matter being appealed." *Ledford v. West*, 136 F.3d 776, 779 (Fed. Cir. 1998). The single judge misunderstood the matter appealed by Mr. Goss was the Board's adverse decision that his fee was unreasonable in excess of the Board's jurisdiction. The procedural history in this matter is clear. The matter appealed by Mr. Casey was whether Mr. Goss's fee agreement met the requirements of § 5904(d) based upon an invalid VA Form 21-22a. A matter over which the Board had jurisdiction based on VA's fee decision. The matter appealed by Mr. Goss to this Court was based on the Board's adverse decision that his fee was unreasonable. Thus, this Court's jurisdiction was established because the Board did have subject matter jurisdiction over the issue presented by Mr. Casey's appeal and this Court had jurisdiction over Mr. Goss's appeal of the Board adverse decision on the reasonableness of his fee.

Thus, the conclusion of the single judge memorandum decision that if the Board lacks jurisdiction to address a matter, "the Court likewise lacks jurisdiction to review it, and th[e] appeal must be dismissed." citing *Garvia v. Shulkin*, 29 Vet.App. 47, 53 (2017) was erroneous as a matter of law. This is so because there was the required predicate for the Board's jurisdiction and there was a different predicate for

this Court's jurisdiction. The required remedy for Mr. Goss's appeal to this Court was reversal the Board's unlawful Order that Mr. Casey was entitled to relief from the payment of Mr. Goss's fee as awarded by VA based on a reasonableness determination made by the Board in the first instance. This Court was not required to dismiss Mr. Casey's actual appeal for lack of jurisdiction since the Board had jurisdiction to address that matter based on Mr. Casey's NOD. To the contrary, this Court was required to remand to the Board with instructions to correct its Order affirming that VA had correctly determined that Mr. Goss was entitled to the fee called for in his fee agreement with Mr. Casey.

This Court has only one source of jurisdiction and that is 38 U.S.C. § 7252. *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 434, 131 S.Ct. 1197, 179 L.Ed.2d 159 (2011). Section 7252 gives this "exclusive jurisdiction to review [Board] decisions," allowing it to "affirm, modify, or reverse" Board decisions and "remand the matter, as appropriate." 38 U.S.C. § 7252(a). Mr. Goss was adversely affected by the Board's decision under 38 U.S.C. § 7266(a) because as the Secretary conceded the decision of the Board was made in excess of its authority. Thus, the single judge memorandum decision erroneously concluded that this Court lacked jurisdiction. The single judge overlooked and misunderstood that the Board had jurisdiction over Mr. Casey's appeal but that the Board's jurisdiction was limited to the issue presented in Mr. Casey's NOD. Furthermore, the single judge overlooked and misunderstood

that this Court had jurisdiction over Mr. Goss's appeal of the Board's decision which adversely affected Mr. Goss. Therefore, a panel decision is required to establish the correct jurisdictional issues presented by a simultaneously contested claim.

CONCLUSION

Wherefore, Mr. Goss respectfully moves this Court to convene a Panel to address the above described points of law overlooked or misunderstood by the single judge in the memorandum decision of October 17, 2022.

Respectfully Submitted,

/s/Kenneth M. Carpenter

Kenneth M. Carpenter

Counsel for Appellant

Robert B. Goss

Electronically filed November 7, 2022.