WHAT'S MISSING AND WHAT'S NEEDED IN THE VA'S REVIEW OF FEE AGREEMENTS

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INTRODUCTION

There is a disconnect between the statutory provisions and the Department of Veterans Affairs'(VA) regulations concerning the review of fee agreements. In 1988, Congress authorized the Secretary of the VA to prescribe in regulation reasonable restrictions on the amount of fees that an agent or attorney[1] may charge a claimant for services rendered in the preparation, presentation, and prosecution of a claim before the

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1. Non-attorney practitioners, known as agents, may represent veterans and claimants in proceedings before the VA after taking an examination in order to be accredited.38 C.F.R. § 14.629 (2017). Attorneys, agents, or veterans' service organizations may represent individuals seeking VA benefits, but veterans' service organizations may not charge fees. 38 C.F.R. § 14.636(b) (2017); 38 C.F.R. § 14.629. Any reference in this article to attorneys will also include agents.

Department.[2] The clearly expressed intent of Congress was to ensure that the fees charged to veterans or other qualifying claimants[3] for representation by agents or attorneys was reasonable and not excessive.[4] Congress requires that agents and attorneys file a copy of any fee agreements for representation with the Secretary so all fee agreements for representation can be reviewed.[5] These reviews occur, however, only upon a motion for such review by the veteran or the VA.[6]

Congress also provided a unique provision to provide an incentive to agents and attorneys to represent veterans before the VA in the provisions of 38 U.S.C. § 5904(d).[7] In this provision Congress allowed for the withholding from a veteran's award of past-due benefits a contingent fee not to exceed twenty percent of the past-due benefits for direct payment by the Secretary to the representing agent or attorney.[8] In so doing, the agent or attorney was guaranteed payment of their contingent fees and veterans would not be required to pay upfront or ongoing fees and any ultimate fee would not exceed twenty percent of any VA award of past-due benefits.[9]

It is also important to note what Congress did not do. Congress did not require agents or attorneys to seek and receive approval for the fees charged for representation.[10] Congress left this matter to the parties to such agreements with the protection of fee review for reasonableness or

2. *See* Veterans' Judicial Review Act, Pub. L. No. 100-687, § 104, 102 Stat. 4105, 4108 (1988) (codified as amended at 38 U.S.C. § 5904(c), (d) (2012)).

3. The terms veteran and claimant are similar but not the same; there are other qualifying claimants for VA benefits. *See* 38 U.S.C. § 3.1(d) (2012); 38 C.F.R. § 14.627(h) (2017). Congress uses these words interchangeably which can be confusing, thus, for the purposes of this article, we will only use the word veteran but readers should understand that term to apply equally to other qualified claimants.

4. *See, e.g.*, 133 Cong. Rec. 416 (1987) ("The basic purpose of this measure is to ensure that veterans and other claimants before the VA receive all benefits to which they are entitled . . . by allowing claimants to pay attorneys reasonable fees for representation . . . .").

5. 38 U.S.C. § 5904(c)(2).

6. *Id.* § 5904(c)(3)(A). Originally, Congress authorized the Board of Veterans Appeals to review fee agreements for reasonableness or excessiveness. Veterans' Judicial Review Act, Pub. L. No. 100-687, § 104, 102 Stat. 4105, 4108 (1988) (codified as amended at 38 U.S.C. § 5904(c)(3)(A) (2012)). In 2006, Congress directed that the Secretary undertake these reviews. Veterans Benefits, Health Care, and Information Technology Act of 2006, Pub. L. No. 109-461, § 101(e)(3)(A), 120 Stat. 3403, 3408 (codified as amended at 38 U.S.C. § 5904(c)(3)(A) (2012)). The Secretary delegated this responsibility to the Office of the General Counsel. 38 C.F.R. § 14.637 (2017).

7. 38 U.S.C. § 5904(d).

8. *Id.* § 5904(d)(2)(A).

9. *See id.*

10. *See id.* § 5904(c)(3)(A) (noting that the Secretary *may* review fee agreements and order a reduction, however, this occurs after the fees are already agreed upon by the agent or attorney and the claimant).

excessiveness of the fees charged.[11] As a result, agents and attorneys are not required to have the fees they charge for representation approved by the VA subject to a motion for review for reasonableness or excessiveness.[12] The terms of the agreement, including the amount of the fee and the method of collection, are matters between the agent and attorneys and their clients.[13] The Secretary, by regulation, permits fees to be charged as a "fixed fee, hourly rate, a percentage of benefits recovered, or a combination of such bases."[14]

Historically, attorneys and agents have been effectively excluded from representing veterans with VA claims.[15] Congress intended to limit this representation by creating a "non-adversarial, paternalistic, uniquely pro-claimant veterans' compensation system."[16] Prior to 1988, the applicable statute was based on Civil War era legislation that limited attorney's fees in veterans benefit claims cases initially to five dollars and later to ten dollars.[17] Congress then recognized that the ten-dollar fee limit was so small as to effectively preclude veterans from employing lawyers to handle their benefits claims.[18] The enactment of the Veterans' Judicial Review Act (VJRA) reflected the intent of Congress that VA claimants should be able to reasonably compensate agents and attorneys for their representation in pursuing benefits claims.[19] The VJRA created an incentive for both agents and attorneys to represent veterans by allowing them to receive direct payment of their fees by the VA from the veterans' awards of past-due benefits as long as the fee was limited to twenty percent of the award.[20] "Because that percentage was less than contingent fees typically found in other areas of practice, Congress gave lawyers the offsetting benefit of certainty of collection" of their fees by providing that the VA would be required to "withhold that percentage from the benefits

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11. *Id.*

12. *See* 38 U.S.C. § 5904(c)(3)(A).

13. *See id.*

14. 38 C.F.R. § 14.636(e) (2017).

15. *See* Steven Reiss & Matthew Tenner, *Effects of Representation by Attorneys in Cases before VA: The "New Paternalism"*, 1 VETERANS L. REV. 2, 3 (2009).

16. Jacquay v. Principi, 304 F.3d 1276, 1286 (Fed. Cir. 2002); Reiss & Tenner, *supra* note 15, at 11.

17. Wick v. Brown (*In re* Wick), 40 F.3d 367, 368–69 (Fed. Cir. 1994) (citing *In re* Smith, 4 Vet. App. 487, 490 (1993)).

18. *See, e.g.*, 131 Cong. Rec. 21,399–402 (1985) ("[T]here would be very real, undesirable barriers to veterans' ability to retain counsel in those cases in which a court ultimately might decide that the fee limitation [of ten dollars] is unconstitutional as applied.").

19. *See id.*; Veterans' Judicial Review Act, Pub. L. No. 100-687, § 104, 102 Stat. 4105, 4108 (1988) (codified as amended at 38 U.S.C. § 5904(c),(d) (2012)).

20. § 104, 102 Stat. at 4108.

awarded" and pay the fee directly to the agent or attorney.[21]

The preamble of the VJRA unambiguously expresses that one of its purposes was to "provide for the payment of reasonable fees to attorneys for rendering legal representation to individuals claiming benefits under laws administered by the Veterans' Administration."[22] Congress explicitly provided for the review of fee agreements to determine whether that fee was excessive or unreasonable.[23] This authorization was originally vested in the Board of Veterans Appeals ("Board") in the first instance.[24] Later, Congress vested this authority to review the *amount* of the fee called for in fee agreements for excessiveness or unreasonableness with the Secretary.[25]

However, Congress did not expressly authorize or otherwise provide for any procedure for the review by the Secretary of fee agreements when the statutory withholding requirements have been met or for reviews to determine eligibility to charge a fee.[26] "The Secretary has authority to prescribe all rules and regulations which are necessary or appropriate to carry out the laws administered by the Department and are consistent with those laws . . . ."[27] Under that authority the Secretary has set out in regulation the circumstances under which fees may be charged.[28] The Secretary has also set out what all fee agreements must include in order to be valid,[29] as well as a regulation that explains when payment of fees by VA will be made directly to an agent or attorney from a veteran's award of past-due benefits.[30] Finally, the Secretary has set out the procedures to be followed by both veterans and the Office of General Counsel to initiate a review to determine whether a fee is excessive or unreasonable.[31]

In practice, the Secretary also undertakes the review of certain fee agreements for *eligibility* determinations without the benefit of a comparable set of procedures as found in 38 C.F.R. § 14.636(i).[32] The

21. Scates v. Principi, 282 F.3d 1362, 1366 (Fed. Cir. 2002).
22. Preamble, 102 Stat. at 4105.
23. 38 U.S.C. § 5904(c)(3)(A) (2012).
24. Veterans' Judicial Review Act, Pub. L. No. 100-687, § 104, 102 Stat. 4105, 4108 (1988) (codified as amended at 38 U.S.C. § 5904(c), (d)); Scates v. Gober, 14 Vet. App. 62, 64 (2000).
25. 38 U.S.C. § 5904(c)(3)(A).
26. *Id.*
27. 38 U.S.C. § 501(a).
28. 38 C.F.R. § 14.636(c) (2017).
29. *Id.* § 14.636(g)(1)–(2).
30. *Id.* § 14.636(h).
31. *Id.* § 14.636(i).
32. *See, e.g.*, Mason v. Shinseki, 26 Vet. App. 1, 8 (2012).

practice of the Secretary since 2001 has been to review only those fee agreements which call for the Secretary to withhold fees under 38 U.S.C. § 5904(d).[33] These reviews are done by the regional offices of the Secretary but only after there has been an award of past-due benefits to the veteran.[34] The Secretary has no regulation which informs veterans or attorneys of the circumstances under which these reviews are made.[35] The Secretary's current practice is not to review non-withholding fee agreements for eligibility determinations.[36] Thus, some but not all fee agreements are reviewed by the Secretary for eligibility determinations,[37] creating serious gaps in the VA's review of fee agreements for eligibility determinations.

The Secretary's current practice regarding reviews for reasonableness and excessiveness are at least codified in regulation, but these regulations do not make clear the differences between an eligibility determination and a review for excessiveness or reasonableness.[38] The VA's regulation for reasonableness review does make clear the specific requirements for pleading, notice, and content, and that these reviews can only be initiated by veterans or by the Office of the General Counsel.[39] Eligibility reviews are not made by the Office of the General Counsel in Washington D.C., but are made by administrative staff in the various regional offices.[40]

As a result, there are two types of fee agreement review. The first is a review for reasonableness, which has a specific procedure set out in regulation and is performed by the Office of the General Counsel.[41] The second is a review for eligibility, which has no specific procedure set out in regulation, is limited in practice to review of withholding fee agreements, and is performed by administrative personnel at regional offices.[42] Importantly, the Secretary has been given no express statutory authority or direction by Congress to develop a fee approval procedure or

33. *See* 38 U.S.C. § 5904(d)(1)–(3) (2012).

34. *Id.* § 5904(d)(2)(i).

35. *See id.* § 5904(d)(1)–(3).

36. *See id.* § 5904(d)(3) (discussing the payment of withheld fees awarded in a proceeding before the Secretary, the Board, or the Court of Appeals for Veterans Claims, but not mentioning the review of non-fee-withholding agreements).

37. *See id.* § 5904(d)(3).

38. *See* 38 C.F.R. § 14.636(c)(3), (i) (2017).

39. *Id.* § 14.636(i)(1)–(3).

40. *Id.* § 14.636(c)(3). The VA has fifty-eight regional offices with at least one in each state. *Regional Benefit Office Websites*, U.S. DEP'T VETERANS AFF., https://www.benefits.va.gov/benefits/offices.asp (last visited Nov. 17, 2017).

41. 38 C.F.R. § 14.636(i).

42. *Id.* § 14.636(c)(3).

to make an eligibility determination generally or under 38 U.S.C. § 5904(d).[43]

This article will examine the statutory and regulatory provisions relevant to fee agreements, the VA's current practices, the judicial interpretations of 38 U.S.C. § 5904, and provide suggestions for what more is needed in the VA's regulations regarding the review of fee agreements.

I. STATUTORY PROVISIONS

The only statute in Title 38 of the United States Code which addresses attorney's fees is found in 38 U.S.C. § 5904. Subsections (c) and (d) relate to the requirements for attorney's fees and when the VA must withhold these fees from a veteran's award of past-due benefits.[44] Section 5904(c) expressly addresses and provides for the review of fee agreements by both the Secretary and the Board to determine whether the fee called for is excessive or unreasonable.[45] Section 5904(d) sets out the specific requirements necessary for the Secretary to withhold an attorney's fee from a veteran's award of past-due benefits.[46] This section does not provide for VA review of fee-withholding agreements to determine compliance.[47] The provisions of 38 U.S.C. § 7263(c) and (d) provide for both direct judicial review for the fee for excessiveness or unreasonableness, as well as review of final Board decisions on these issues.

A. 38 U.S.C. § 5904(c)—Agency Review of Fee Agreements

Presently, 38 U.S.C. § 5904(c) has four subsections, of which only the first three are relevant to this article.[48] Section 5904(c)(1) states that "a fee may not be charged, allowed, or paid for services of agents and attorneys with respect to services provided before the date on which a notice of disagreement is filed with respect to the case."[49] Congress did not define the term "case" and to date, the Secretary has not defined the

43. 38 U.S.C. § 5904(d) (2012).

44. *Id.* § 5904(c), (d). Subsections (a) and (b) of 38 U.S.C. § 5904 address VA's recognition and suspension of agents and attorneys and are not relevant to this article.

45. *Id.* § 5904(c)(3)(A)–(B).

46. *Id.* § 5904(d).

47. *Id.*

48. 38 U.S.C. § 5904(c)(1)–(3). Section 5904(c)(4) addresses fees charged by attorneys in a case regarding VA housing and small business loans. *Id.* § 5904(c)(4).

49. *Id.* § 5904(c)(1). This suggests that fees *are* allowed for services provided *after* the date the notice of disagreement is filed.

term "case" in regulation.[50] However, the United States Court of Appeals for the Federal Circuit ("Federal Circuit") in a non-fee case did define the term "case" as encompassing "all potential claims raised by the evidence, applying all relevant laws and regulations, regardless of whether the claim is specifically labeled."[51]

Section 5904(c)(2) requires that a person acting as an agent or attorney in a case "shall file a copy of any fee agreement between them with the Secretary pursuant to regulations prescribed by the Secretary."[52] Section 5904(c)(3)(A) provides that "[t]he Secretary may, upon the Secretary's own motion or at the request of the claimant, review a fee agreement filed . . . and may order a reduction in the fee called for in the agreement if the Secretary finds that the fee is excessive or unreasonable."[53] This provision is clear and unambiguous in that it authorizes the Secretary to review a fee agreement submitted by an agent or an attorney to determine whether the fee called for in the fee agreement is excessive or unreasonable. The term "excessive or unreasonable" is not defined by Congress and has not been defined by the Secretary in regulation.

Section 5904(c)(3)(B) mandates that "[a] finding or order of the Secretary under [§ 5904(c)(3)(A)] may be reviewed by the Board of Veterans' Appeals under [38 U.S.C. § 7104]."[54] This means that the decision of the Secretary may be appealed by either the claimant or the representative to the Board for administrative appellate review. The decision of the Board is subject to judicial appellate review by the Court of Appeals for Veterans Claims ("Veterans Court").[55] This provision is limited to a review of the amount of the fee charged.[56]

50. *See generally* 38 U.S.C. § 101 (2012) (indicating that "case" was never among the terms defined by Congress); 38 C.F.R § 14.627 (2017) (defining terms used in regulations on representation of VA claimants, but not defining "case").

51. Carpenter v. Nicholson, 452 F. 3d. 1379, 1384 (Fed. Cir. 2006) (citing Roberson v. Principi, 251 F.3d 1378, 1384 (Fed. Cir. 2001)).

52. 38 U.S.C. § 5904(c)(2).

53. *Id.* § 5904(c)(3)(A).

54. 38 U.S.C. § 5904(c)(3)(B).

55. 38 U.S.C. §§ 7252(a), 7266(a).

56. *Id.* Section 5904(c)(3)(C) further provides that if the Secretary submits an order reducing a fee under § 5904(c)(3)(A), based upon collection or receipt of a fee in excess of the amount authorized by the Secretary and an agent or attorney fails to make full restitution to each claimant from whom the agent or attorney has collected or received an excessive fee, the agent may be suspended until the agent or attorney makes full restitution, at which time the Secretary may reinstate such agent or attorney. 38 U.S.C. §5904(c)(3)(C).

B. 38 U.S.C. § 5904(d)—Payment of Fees Out of Past-Due Benefits

The provisions of 38 U.S.C. § 5904(d) have remained substantially the same since 1988.[57] Section 5904(d) explicitly provides that the Secretary is required to make payment of fees to agents or attorneys who have entered into fee agreements which are in accordance with its terms set out in this statute in the event that the claimant is awarded any past-due benefits as a result of the case.[58] Again, the term "case" is not defined by the statute but the Federal Circuit defined it as encompassing "all potential claims raised by the evidence, applying all relevant laws and regulations, regardless of whether the claim is specifically labeled."[59]

The provisions of § 5904(d) are unique in federal administrative law in two respects. First, Congress explicitly defined the terms of the agreement between the claimant and the agent or attorney. Second, Congress expressly provided that if the fee agreement complied with the terms specified in the statute, that the Secretary would be required to withhold and pay the fee called for in the agreement to the accredited agent or attorney.[60] These authors are unaware of any other federal fee statute in which Congress has dictated the terms of a fee agreement and mandates a federal agency to pay the fees from an award of past-due benefits. It is also important to understand that § 5904(d) does not preclude an agent or attorney from entering into a fee agreement with a claimant which does not comply with the provisions of § 5904(d).[61] Such a fee agreement could call for a fee payable at an hourly rate, a fixed fee amount, or a contingent fee for more than twenty percent of the past-due benefits awarded to the claimant.[62] However, in so doing, the agent or attorney must collect the fee directly from the claimant.[63]

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57. 38 U.S.C. § 5904(d).

58. *Id.* § 5904(d)(3); Snyder v. Principi, 15 Vet. App. 285, 292–93 (2001) (stating that if a direct-payment contingency-fee agreement has met the statutory and regulatory requirements, the Secretary is required, by the Secretary's own regulation, to make payment to the attorney even if the Secretary has mistakenly disbursed to the veteran the past-due benefits being withheld pursuant to the agreement).

59. Carpenter v. Nicholson, 452 F. 3d. 1379, 1384 (Fed. Cir. 2006) (citing Roberson v. Principi, 251 F.3d 1378, 1384 (Fed. Cir. 2001)).

60. 38 U.S.C. § 5904(d)(3); *see Snyder*, 15 Vet. App. at 292–93.

61. *See* 38 U.S.C. § 5904(d)(2)(A). To be in compliance, this section requires that the fee agreement is one where the total amount payable to the agent or attorney is (1) paid to the agent or attorney by the Secretary directly from past-due benefits awarded on the basis of the claim, and (2) is contingent on whether or not the matter is resolved in a manner favorable to the claimant. *Id.*

62. 38 C.F.R. § 14.636 (e)–(f) (2017).

63. *Id.* § 14.636(g)(2). However, collection by means of litigation to collect an unpaid fee is generally futile because VA disability compensation is not subject to seizure or attachment. *See* 38 U.S.C. § 5301 (a)(1) ("Payment of benefits . . . shall be exempt from the claim of

Section 5904(d)(1) provides that when a claimant and an agent or attorney have entered into a fee agreement described in § 5904(d)(2), the total fee payable to the agent or attorney may not exceed twenty percent of the total amount of any past-due benefits awarded on the basis of the claim.[64] This sets out the first requirement for a fee withholding agreement.[65] It is important to recognize that Congress uses the term "claim" when referring to the total amount of any past-due benefits awarded and not the term "case."[66] This confirms that Congress knowingly used the broader term "case" when referring to representation and the more narrow term "claim" when referring to the total amount of any past-due benefits awarded to the claimant. This distinction supports the view that an agent or attorney who represents without limitation in a claimant's case is entitled to a fee based on any "claims raised by the evidence, applying all relevant laws and regulations, regardless of whether the claim is specifically labeled."[67]

Section 5904(d)(2)(A) further elaborates on the process for the payment of fees to an agent or attorney out of a claimant's award of past-due benefits.[68] Congress explicitly provides that the fee agreement referred to in § 5904(d)(1)

> (i) is one under which the total amount of the fee payable to the agent or attorney is to be paid to the agent or attorney by the Secretary directly from any past-due benefits awarded on the basis of the claim; and (ii) is contingent on whether or not the matter is resolved in a manner favorable to the claimant.[69]

Section 5904(d)(2)(B) explains that for purposes of § 5904(d)(2)(A), a "claim" and not a "case" "shall be considered to have been resolved in a manner favorable to the claimant if all or any part of the relief sought is granted" by the VA.[70]

Section 5904(d)(3) instructs that "the Secretary may direct that payment of any fee to an agent or attorney under a fee arrangement described in [§ 5904(d)(1)] be made out of such past-due benefits."[71] This provision has been interpreted by the Veterans Court as mandatory and

creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary.").

64. 38 U.S.C. § 5904(d)(1).
65. *Id.* § 5904(d)(1)–(2).
66. *Id.* § 5904(d)(1).
67. Roberson v. Principi, 251 F.3d 1378, 1384 (Fed. Cir. 2001).
68. 38 U.S.C. § 5904(d)(2)(A)(i)–(ii).
69. *Id.*
70. *Id.* § 5904(d)(2)(B).
71. *Id.* § 5904(d)(3).

not permissive.[72] However, the VA, since the decision of the Veterans Court in *Scates v. Gober* and the Federal Circuit's decision in *Scates v. Principi*, has adopted an unwritten policy in which fee decisions are made which include a notice of appellate rights to the agent or attorney and the veteran.[73]

C. 38 U.S.C. § 7263—Judicial Review of Fee Agreements

In addition to review by the Secretary of the amount of the fee called for in a fee agreement between a claimant and an agent or attorney, Congress authorized the Veterans Court to review the fee called for in a fee agreement between a claimant and an agent or attorney.[74] This statute requires that "[a] person who represents an appellant before the Court shall file a copy of any fee agreement between the appellant and that person with the Court at the time the appeal is filed."[75] This statute also provides that "[t]he Court, on its own motion or the motion of any party, may review such a fee agreement."[76]

Subsection 7263(d) authorizes the court to review a fee agreement under either this statute or under § 5904(c)(3).[77] In reviewing for reasonableness, the court, either in a direct review of the fee agreement filed with the court or from a review of a Board decision, can affirm the Board's finding or order a reduction in the fee called for in the agreement if it finds that the fee is excessive or unreasonable.[78] Significantly, this judicial review is final and may not be reviewed in any other court.[79]

72. Snyder v. Gober, 14 Vet. App. 154, 164 (2000).

73. *See generally* 14 Vet. App. 62 (2000) (stating that after a claim is decided by the Regional Office, the aggrieved party may file a Notice of Disagreement and pursue an appeal to the Board and the Veterans Court if they so choose); 282 F.3d 1362 (Fed. Cir. 2002) (discussing issues surrounding the appropriate forum to hear the claim and modifying the Veterans Court judgment, ultimately remanding to the Regional Office for further proceedings).

74. 38 U.S.C. § 7263(c). Subsections 7263(a) and (b) are not pertinent to this article.

75. *Id.*

76. *Id.*

77. *Id.* § 7263(d). When Congress amended 38 U.S.C. § 5904(c) in 2006 to vest the power of review of the amount charged in fee decisions with the Secretary, it failed to also amend 38 U.S.C. § 7263(d) to reflect the change from § 5904(c)(2) to § 5904(c)(3). *Compare* Veterans Benefits, Health Care, and Information Technology Act of 2006, Pub. L. No. 109-461, § 101(e)(3)(A), 120 Stat. 3403, 3408 (codified as amended at 38 U.S.C. § 5904(c)(3)(A) (2012)) (amending § 5904(c) to reflect review by the Secretary, declining to amend § 7263(d)), *with* 38 U.S.C. § 7263(d) (2012) (referring to section 5904(c)(2) for review of fee agreements).

78. 38 U.S.C. § 7252(a) (2012); *id.* § 7263(c), (d).

79. *Id.* § 7263(d).

II. REGULATORY PROVISIONS

The Secretary has promulgated regulations interpreting and implementing the provisions of 38 U.S.C. § 5904 in the Code of Federal Regulations at 38 C.F.R. § 14.636. Pertinent to this article include 38 C.F.R. § 14636 subsections (c), (e), (f), (g), (h), and (i).

Thirty-eight C.F.R. § 14.636(c) addresses the circumstances under which fees may be charged by an agent or an attorney, which merely parrots the language of 38 U.S.C. § 5904(c)(1) that a notice of disagreement has been filed with respect to a decision on or after June 20, 2007 in order to allow an agent or attorney to charge a fee.[80] Thirty-eight C.F.R. § 14.636(c)(2) addresses how fees may be charged where the notice of disagreement is filed prior to June 20, 2007.[81] Thirty-eight C.F.R. § 14.636(c)(3) provides that the agency of original jurisdiction that issued the decision identified in a notice of disagreement shall determine whether an agent or attorney is eligible for fees under § 14.636(c).[82] This determination is limited to the binary question of whether the notice of disagreement was filed before or after June 20, 2007 and no more.[83]

Thirty-eight C.F.R. § 14.636(e) details the factors to be considered in determining the reasonableness of the fees charged by an agent or attorney.[84] This provision provides guidance regarding how the Secretary will assess whether the fee charged is excessive or unreasonable based on the statutorily authorized review by the Secretary. Thirty-eight C.F.R. § 14.636(f) further details certain presumptions that the Secretary has established:

> Fees which do not exceed 20 percent of any past-due benefits awarded as defined in paragraph (h)(3) of this section shall be presumed to be reasonable. Fees which exceed 331/3 percent of any past-due benefits awarded shall be presumed to be unreasonable. These presumptions may be rebutted through an examination of the factors in paragraph (e) of this section establishing that there is clear and convincing evidence

80. 38 C.F.R § 14.636(c)(1) (2017). This section explains the circumstances specific to a request for revision of a decision of an agency of original jurisdiction under 38 U.S.C. § 5109(a) or the Board under 38 U.S.C. § 7111 based on clear and unmistakable error. *Id.*

81. *Id.* § 14.636(c)(2)(i)–(ii) (2017). An attorney may enter into a fee agreement after the final decision of the Board and within one year of such decision. *Id.*

82. *Id.* § 14.636(c)(3). This is a "final adjudicative action and may be appealed to the Board." 38 C.F.R § 14.636(c)(3).

83. *Id.* This section does not apply to a motion for review of a fee agreement under (i) or to a motion for review of expenses under 38 C.F.R. § 14.637—both of which can be reviewed by the Office of General Counsel upon its own motion. *Id.* § 14.636(i); *id.* § 14.637(d) (2017). Section 14.636(d) addresses exceptions that are allowed by the VA regarding when a fee may be charged; those circumstances are not relevant to this article. *Id.* § 14.636(d) (2017).

84. 38 C.F.R. § 14.636(e)(1)–(8).

> that a fee which does not exceed 20 percent of any past-due benefits awarded is not reasonable or that a fee which exceeds 331/3 percent is reasonable in a specific circumstance.[85]

Thirty-eight C.F.R. § 14.636(h) is titled "Payment of fees by Department of Veterans Affairs directly to an agent or attorney from past-due benefits" and implements 38 U.S.C. §5904(d). This section provides that, subject to the provisions regarding eligibility to charge fees[86] and reasonableness,[87] a direct payment fee agreement will be "honored by the VA" if the total fee does not exceed twenty percent of the past-due benefits,[88] the fee is contingent on the claim being "resolved in a manner favorable to the claimant,"[89] and there is a cash payment as a result of the award of past-due benefits.[90] This section does not mention anything about reviewing fee agreements for eligibility.

Thirty-eight C.F.R. § 14.636(i) is titled "Motion for review of fee agreement." In this provision the Secretary has set out a very specific process to be conducted by the Office of the General Counsel that must be followed in order to initiate a review of a fee agreement as contemplated by 38 U.S.C. § 5904(c)(3)(A).[91] In particular, "[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."[92] Unfortunately, the Secretary's regulation is unclear in regard to what "final action" is being referenced as the starting date of the 120 day period.[93] One option is the date of the

85. *Id.* § 14.636(f). Section 14.636(g) affirms that all agreements for the payment of fees for services of agents and attorneys (including agreements involving fees or salary paid by an organization, governmental entity, or other disinterested third party) must be in writing and signed by both the claimant or appellant and the agent or attorney. *Id.* § 14.636(g). In addition, this provision addresses the requirement for direct fee payment agreements. *Id.*

86. *Id.* § 14.636(c).

87. 38 C.F.R. § 14.636(e).

88. *Id.* § 14.636(h)(1)(i). For purposes of this section, "past-due benefits" is defined at 38 C.F.R. § 14.636(h)(3).

89. *Id.* § 14.636(h)(1)(ii). This standard is met "if all or any part of the relief sought is granted." *Id.* § 14.636(h)(2).

90. *Id.* § 14.636(h)(1)(iii). In cases where the veteran is also receiving retirement pay, there may not be a "cash payment" even though the veteran's claim was granted. *Id.* § 14.636(h)(1)(iii).

91. 38 C.F.R. § 14.636(i).

92. *Id.*

93. The VA manual notes that, "[i]n most cases final VA action means 120 days from the date of the fee eligibility decision." U.S. DEP'T VETERANS AFF., VA ADJUDICATION PROCEDURES MANUAL M21-1, pt. I, 3.C.6.b. (2017), https://www.benefits.va.gov/WARMS/M21_1.asp. This provides some insight but does not further explain in which cases this is not the "final VA action" or define what a "final VA action" would be in a non-withholding fee

VA's decision to award the claimant past-due benefits because that date triggers the Secretary's duty to withhold and pay the agent or attorney's fee as mandated by 38 U.S.C. § 5904(d).[94] The other possible intended date is the date of the VA's notification to the claimant and the agent or attorney that the VA intends to withhold and pay the fee called for in the fee agreement from the claimant's award of past-due benefits.[95]

This provision also states that "[t]he Office of the General Counsel 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 under [subsection (c)]".[96] However, as noted above, § 14.636(c)(3) provides *only* that "the agency of original jurisdiction that issued the decision identified in a Notice of Disagreement shall determine whether an agent or attorney is eligible for fees under [subsection (c)]."[97]

The remaining portions of 38 C.F.R. § 14.636(i) detail the specifics for how a motion is to be filed, what it must contain, to whom it must be served, and where it must be filed, along with deadlines for response.[98] Upon review of the VA's regulations, the only regulation that remotely provides for a decision on eligibility is limited by the plain language of the regulation to the binary question of whether the fee agreement meets the requirements of 38 U.S.C. § 5904(d) or not.[99] There is no statute or regulation which authorizes the Secretary to make decisions which either award or approve the fees charged by agents or attorneys to veterans. The statutes authorize review for reasonableness or excessiveness and mandate withholding of fees by the Secretary from a veteran's award of past-due benefits.[100]

agreement. *Id.* Additionally, the VA's manual is not considered to be binding as it does not have the "force of law." Disabled Am. Veterans v. Sec'y of Veterans Affairs, 859 F.3d 1072, 1077 (Fed. Cir. 2017).

94. 38 U.S.C. § 5904(d)(3) (2012).

95. *Id.* § 5904(c)(1).

96. 38 C.F.R. § 14.636(h)(4).

97. *Id.* § 14.636(c)(3). The VA notes in its manual that in a reasonableness review, the Secretary "only addresses eligibility under" this section when it is a non-withholding fee agreement. U.S. DEP'T VETERANS AFF., VA ADJUDICATION PROCEDURES MANUAL M21-1, pt. I, 3.C.6.a. (2017), https://www.benefits.va.gov/WARMS/M21_1.asp.

98. 38 C.F.R. § 14.636(i) (giving a detailed explanation of the requirements for a motion for review of a fee agreement, including required content and procedures for filing, service response, answer, and appeals).

99. *Id.* § 14.636(c)(3).

100. 38 U.S.C. § 5904(c)(3)(A), (d)(3).

III. THE *SCATES* DECISIONS

There have been two decisions that have addressed the review process of fee agreements. One decision was by the en banc Veterans Court and the other a precedential decision of the Federal Circuit reviewing and modifying that decision. It is important to understand that these decisions were made prior to Congress's 2006 amendment of 38 U.S.C. § 5904.[101] At the time of these decisions, the prior version of § 5904(c) gave express authority to the Board to review any fee agreement on its own motion for reasonableness.[102] This prior version of the statute did not address a review of fee agreements for compliance with § 5904(d)—the requirements for withholding and payment of fees by the Secretary.[103]

In *Scates v. Gober*, the Board overreached its jurisdiction and addressed, in the first instance, the question of whether a fee agreement was compliant with §5904(d) without an initial decision by the Secretary on the issue that had been appealed to the Board.[104] The en banc Veterans Court agreed that the Board had exceeded its statutory authority by addressing the issue of compliance with § 5904(d) in the first instance.[105] The Federal Circuit affirmed, but modified, the decision of the Veterans Court.[106] Congress amended §5904 in December 2006, directing the Secretary, not the Board, review for reasonableness in the first instance.[107]

A. Scates v. Gober, 14 Vet. App. 62 (2000)

In 2000, twelve years after the enactment of the VJRA, the Veterans Court held that the Board did not have original jurisdiction to consider any issues regarding entitlement to attorney's fees in direct-payment cases.[108] At the time of the decision, the Board had original jurisdiction to review fee agreements filed with the Board—either sua sponte or at the request of either party—and could "order a reduction in the fee called for

101. *See* Scates v. Gober, 14 Vet. App. 62, 64 (2000) (citing 38 U.S.C. § 5904(c)(2) (2000) (amended 2006)). *Compare* 38 U.S.C. § 5904(c)(2) (2000) (allowing the Board to review fee agreements for excessive or unreasonableness), *with* 38 U.S.C. § 5904(3)(A) (2012) (allowing the Secretary to review fee agreements for excessive or unreasonableness).

102. 38 U.S.C. § 5904(c)(2) (2000) (amended 2006).

103. *Id*.

104. *Scates*, 14 Vet. App. at 63.

105. *Scates*, 14 Vet. App. at 63, 64 (citing Cox v. West, 149 F.3d 1360, 1365 (Fed. Cir. 1998)).

106. Scates v. Principi, 282 F.3d 1362, 1363 (Fed. Cir. 2002).

107. Veterans Benefits, Health Care, and Information Technology Act of 2006, Pub. L. No. 109-461, § 101, 120 Stat. 3403, 3408 (codified as amended at 38 U.S.C. § 5904 (2012)).

108. *Scates*, 14 Vet. App. at 65.

in the agreement if the Board finds that the fee is excessive or unreasonable."[109] At the time, the statute required that all fee agreements be filed with the Board because a fee could not be charged before a final decision of the Board under the prior version of 38 U.S.C. § 5904(c).[110] The Veterans Court correctly recognized that Title 38 of the United States Code contemplated a progression of claims adjudication from the initial decision at the agency of original jurisdiction, usually a regional office, to review by the Board acting as a quasi-appellate body.[111] Thus, in the context of a decision based on the Secretary's review of a fee agreement, there must be a decision that affects a veteran's benefits.[112]

The problem, then and now, is that there exists no statutory or regulatory basis for the VA to review a fee agreement regarding an attorney's entitlement to attorney's fees in direct-payment cases.[113] There has never been a statute or a regulation that authorizes, directs, or requires that the Secretary make a decision determining an agent or an attorney's entitlement to the fee called for in the fee agreement with the veteran. There is no provision concerning the Secretary awarding or granting attorney's fees in either direct-payment cases or in non-withholding fee agreement cases. Thus, while the Veterans Court correctly decided that the Board had no statutory authority in the first instance to review a fee agreement for eligibility to charge a fee, the decision in *Scates* did not address what type of decision was required based on the provisions of 38 U.S.C. § 5904(d).[114]

The decision in *Scates* was correctly anchored by the provisions of 38 U.S.C. § 511(a) which provide that "the Secretary shall decide all questions of law and fact necessary to a decision by the Secretary under

109. *Id.* at 64 (quoting 38 U.S.C. § 5904(c)(2) (2000) (amended 2006)).

110. 38 U.S.C. § 5904(c)(1) (2000) (amended 2006).

111. *See Scates*, 14 Vet. App. at 64 (first citing 38 U.S.C. § 511(a) (2012); then citing 38 U.S.C. §7104(a) (2012); then citing 38 C.F.R. §§ 19.9 (1999) (amended 2011); and then citing 38 C.F.R. § 20.1104 (2017)).

112. *See* 38 U.S.C. § 5904(c)(3)(A) (2012).

113. *See Scates*, 14 Vet. App. at 64 ("The authority to review fee agreements for 'eligibility' does not appear in the statute . . . it appears that eligibility to charge a fee in non-direct-payment cases may be reviewed by the BVA in the first instance as a component of its section 5904(c)(2) authority to review for reasonableness."). The phrase "direct payment cases" is based upon the provision of 38 U.S.C. § 5904(d) which mandates that the Secretary make direct payment of the fee called for in a contingent fee agreement, if twenty percent or less, to be made directly to the attorney. 38 U.S.C. § 5904(d). This is distinguishable from a "non-withholding fee agreement" in which the Secretary is not required to withhold the attorney's fee from the VA's award of past-due benefits because the contingent fee did not call for more than twenty percent or called for a fee based upon an hourly rate, a fixed fee, a contingent fee, or a combination of all three. 38 C.F.R. § 14.636(e).

114. *Scates*, 14 Vet. App. at 64–65.

a law that affects the provision of benefits by the Secretary to veterans or the dependents or survivors of veterans."[115] Only such decisions are entitled to administrative appellate review by the Board.[116]

The Veterans Court further recognized that the Board's jurisdictional statute, 38 U.S.C. § 7104(a), is premised upon Congress's mandate that "[a]ll questions . . . subject to a decision by the Secretary" under 38 U.S.C. § 511(a) are intended to be "subject to one review on appeal to the Secretary."[117] Put another way, only when the Secretary makes a "decision" is that "decision" subject to administrative appellate review by the Board. An appeal of a decision of the Secretary must be initiated and completed in accordance with the provisions of 38 U.S.C. § 7105.[118] The Veterans Court also recognized that while Congress had given the Board sua sponte jurisdiction to review fee agreements for "excessiveness or unreasonableness," it had not given the Board authority to review fee agreements on any other basis.[119] Therefore, any other type of "fee decision"[120] must be made by the Secretary in the first instance because such decisions would involve a question in a matter under the Secretary's authority under § 511(a).[121]

The decision in *Scates* was premised upon an assumption that the agent or attorney would be making a "claim" for payment of the fee upon the Secretary.[122] This assumption was and remains mistaken. It is not supported by any statutory or regulatory provision requiring an agent or

115. *Id.* at 64 (citing 38 U.S.C. § 511(a) (2012)).

116. 38 U.S.C. § 7104(a) (explaining that decisions made by the Secretary under § 511(a) may be appealed once to the Board); *see id.* § 7105 (explaining the appeals process for claimants).

117. *Scates*, 14 Vet. App. at 64 (quoting 38 U.S.C. § 7104).

118. 38 U.S.C. § 7105(a) ("Appellate review will be initiated by notice of disagreement and completed by a substantive appeal after a statement of the case is furnished as prescribed in this section.").

119. *Scates*, 14 Vet. App. at 64 (citing 38 U.S.C. § 5904(c)(2) (2000) (amended 2006)). There was little discussion by the Veterans Court in its decision about what the bases might be for a decision or what statutory or regulatory basis for such decision making might be other than the general authority of the Secretary to make decision which affected benefits. *Id.*

120. Following the decision in *Scates* as modified by the Federal Circuit, the "fee decision" evolved, but there is no "fee decision" being made. The decision being made is whether the fee agreement complies with the requirements of § 5904(d) requiring that the fee withheld by the Secretary from the veteran's award of past-due benefits to be paid to the agent or attorney. 38 U.S.C. § 5904(d).

121. *Id.* § 511(a) ("The Secretary shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans or the dependents or survivors of veterans.").

122. *Scates*, 14 Vet. App. at 64 ("Implicitly acknowledging the adjudication progression at the agency level in the context of a claim for direct payment of a contingency fee by the Secretary . . . .").

attorney to file a claim for the fee required to be withheld by the Secretary under § 5904(d). There simply has never been a statute or a regulation which required an agent or an attorney to make a "claim" for the payment of the fee that the Secretary was mandated by Congress to withhold from the veteran's award of past-due benefits under § 5904(d). Congress did not enact a statute which required an agent or an attorney to make a "claim" for the payment of a fee negotiated with a veteran or other qualifying claimant. This is not to say that the Secretary could not promulgate a regulation which requires an agent or an attorney to make a "claim" with the Secretary in order to receive payment the fee called for in an agreement made under § 5904(d). Nevertheless, since the decision in *Scates*, the Secretary has relied upon *ad hoc* procedures for making "fee decisions" and has successfully evaded both notice and comment rulemaking as well as judicial scrutiny.[123]

The Veterans Court in its *Scates* decision concluded that "the Board's general jurisdiction [was] limited to the review of [a]ll questions in a matter which under section 511(a) . . . is subject to a decision by the Secretary" based upon the provisions of 38 U.S.C. § 7104.[124] As such, the Board's consideration of a decision of the Secretary which merely confirms that the requirements of § 5904(d) were met is not a § 511(a) decision subject to appeal because such a decision does not affect the veteran's benefits.[125] Fee agreements which are entered into under § 5904(d) require that the veteran assign his or her potential past-due benefits award to the agent or attorney in consideration of representation before the VA on a contingent fee basis where the fee cannot exceed twenty percent of the veteran's potential past-due benefit award.[126] As such, the decision of the Secretary is limited in scope to *only* whether the requirements of § 5904(d) have been met.[127] If they have been met, the Secretary must withhold and pay the fee called for in the compliant fee agreement to the agent or attorney.[128] If the requirements have not been met, the agent or attorney must appeal the Secretary's decision or have

123. *See, e.g.*, Bly v. McDonald, 28 Vet. App. 256, 264 (2016) (citing Lippman v. Shinseki, 23 Vet. App. 243, 253–54 (2009)) ("Case law is clear that in reviewing fees for reasonableness, the Secretary may consider not only the factors set forth in 38 C.F.R. § 14.636(e) but also other factors pertinent to the specific circumstances of the case."); Lippman v. Nicholson, 21 Vet. App. 184, 189–90 (2007).

124. *Scates*, 14 Vet. App. at 64 (quoting 38 U.S.C. § 7104(a)).

125. *Id.* at 64 (quoting § 7104(a)) ("In turn, the Board's general jurisdiction is limited to the review of all questions in a matter which under section 511(a) of Title 38, U.S. Code, is subject to a decision by the Secretary.").

126. 38 U.S.C. § 5904(d)(1)–(2).

127. *Id.* § 5904(c)(3)(A).

128. *Id.* § 5904(d)(3).

worked without compensation.[129]

B. Scates v. Principi*, 282 F.3d 1362 (Fed. Cir. 2002)*

The decision of the Veterans Court in *Scates* was reviewed by the Federal Circuit in *Scates v. Principi*.[130] In that decision, the Federal Circuit held the following: (1) the attorney, who was discharged during proceedings on the veteran's claims, was entitled only to a fee that fairly and accurately reflected his contribution to the award of benefits; (2) the regional office for the Department of Veterans Affairs was the appropriate agency to decide an attorney's claim for fees in first instance; and (3) the veteran could participate in proceedings in the regional office.[131]

The first holding pertains to the prior statutory duty of the Board to review for excessiveness or unreasonableness, a review never initiated by either Mr. Scates or the Board as required by statute.[132] The second holding is correct but limited to a decision of the Secretary under § 511(a).[133] In fact, the decision made by the regional office in the *Scates* case on remand was that the fee agreement between Mr. Scates and his attorney met the requirements of § 5904(d) and that the attorney was entitled to the fee called for in the fee agreement.[134] Mr. Scates never sought review of the fee called for in the fee agreement by the Board to determine its reasonableness.[135] Although Mr. Scates initiated and completed an appeal of the VA's decision that his fee agreement with his attorney met the requirements of § 5904(d), he eventually withdrew his appeal in 2006 and his attorney was thereafter paid by the Secretary.[136] The Federal Circuit concluded:

> In sum, an attorney with a contingent fee contract for payment of twenty percent of accrued veterans benefits awarded, discharged by the client before the case is completed, *is not automatically entitled to the full*

129. *Id.* § 7105.

130. 282 F.3d 1362, 1363 (Fed. Cir. 2002).

131. *Id.* at 1366–67, 1369.

132. *Id.* at 1366 (quoting 38 U.S.C. § 5904(c)(2) (2000) (amended 2006)).

133. *Id.* at 1366–67 (quoting 38 U.S.C. § 511(a) (2012)).

134. Scates v. Principi, 2003 U.S. App. Vet. Claims LEXIS 881, at *4 (Vet. App. 2003).

135. *See Scates*, 282 F.3d at 1363 ("The question before us is which component of the Department—the Board of Veterans' Appeals . . . or the Regional Office—should decide initially the lawyer's claim.").

136. Scates v. Principi, 96 F. App'x 717,717 (Fed. Cir. 2004). After ten years, Mr. Scates' attorney received from the Secretary the payment of a fee in the amount of $30,624.33. This is an example of how long it can take to litigate a favorable decision on compliance and demonstrates the importance of the need for regulations concerning these decisions of the Secretary.

> *twenty percent fee*. He may receive only a fee that fairly and accurately reflects his contribution to and responsibility for the benefits awarded.[137]

This conclusion by the Federal Circuit shows the confusion that existed and continues to exist surrounding the procedures for reviewing fee agreements. It is correct that an agent or attorney is not "automatically entitled to the full twenty percent fee."[138] The issue of entitlement is a different issue from the question of whether a fee is either excessive or unreasonable.[139] The latter question must be expressly raised by either the claimant or the Secretary by motion.[140] A motion for such a review was provided for by Congress, but Congress left to the Secretary to provide by regulation the procedures which must be followed by a claimant and the General Counsel.[141]

IV. THE RESULTING INQUIRIES

There is a statutory difference between a determination by the Secretary that the statutory or regulatory requirements for withholding have been met and the statutory authority to review upon motion the amount of the fee called for in a fee agreement to determine whether the fee is either excessive or unreasonable. These are two separate and distinct inquiries. Additionally, a decision by the Secretary under his § 511(a) authority on when an agent or attorney is eligible or entitled to charge a fee to a veteran is different from either of the preceding inquiries.[142]

When an agent or an attorney has been discharged after a fee agreement has been entered into but before an award of past-due benefits has been made, there are three potential issues to be addressed. First, whether the agent or attorney is eligible or entitled to charge a fee to a veteran. Second, if the fee agreement calls for withholding by the

137. *Scates*, 282 F.3d at 1366 (emphasis added).

138. *Id.*

139. *Compare* 38 U.S.C. § 5904(d) (2012) (detailing entitlement of fees), *with* 38 U.S.C. § 5904(c)(3) (2012) (detailing the question of whether a fee is excessive or unreasonable).

140. 38 U.S.C. § 5904(c)(3)(A).

141. *Id.*; 38 C.F.R. § 14.636(i) (2017).

142. *Compare* 38 U.S.C. § 511(a) ("The Secretary shall decide all questions of law and fact necessary to a decision . . . . [T]he decision of the Secretary as to any such question shall be final and conclusive and may not be reviewed by any other official or by any court . . . ."), *with* 38 U.S.C. § 5904(c)(3) ("The Secretary may, upon the Secretary's own motion or at the request of the claimant, review a fee agreement filed . . . and may order a reduction in the fee called for in the fee agreement if the Secretary finds that the fee is excessive or unreasonable."). The Board may review the Secretary's decision under 38 U.S.C. § 5094(c)(3)(B).

Secretary, whether the requirements for withholding have been met. Third, whether the amount of the fee called for in the fee agreement, whether withholding or not, is excessive or unreasonable.

The discharge or withdrawal before an award of past-due benefits is not relevant to the Secretary's obligation to withhold the fee called for if the fee agreement meets the statutory or regulatory requirements of § 5904(d).[143] The inquiry when there has been a discharge is one of whether the fee called for is excessive or unreasonable under § 5904(c)(3).[144] The inquiry concerning whether a fee agreement meets the statutory or regulatory requirements for withholding by the Secretary under § 5904(d) is not the same inquiry related to the reasonableness or excessiveness of the fee under § 5904(c)(3).[145] The Federal Circuit correctly noted in *Scates* that

> [t]he line between (1) entitlement to and (2) reasonableness and excessiveness of attorney fees may not be as clear and bright as the Veterans Court believed. That court apparently viewed the dispute in this case as one involving "entitlement" (over which the Board lacked "original jurisdiction") and therefore an issue over which only the Regional Office had original jurisdiction. Suppose, for example, it was determined that an appropriate fee for [the attorney] would be ten percent of the awarded accrued past benefits. Could not that conclusion also be framed in terms of reasonableness and excessiveness, i.e., any fee of more than that amount would be unreasonable and excessive? *Thus, it is unclear that this case involves solely entitlement to, rather than the reasonableness of, an attorney fee.*[146]

This observation recognized the confusion between decisions of the VA in the context of a discharged agent or attorney and a decision by the Secretary concerning whether the requirements for withholding have been met under § 5904(d).

A VA decision addressing the fee payable to an agent or attorney discharged or who withdrew prior to an award of past-due benefits *requires* a motion made under 38 U.S.C. § 5904(c)(3)(A) and 38 C.F.R. § 14.636(i).[147] Such considerations go to reasonableness or excessiveness

143. 38 U.S.C. § 5904(d) (explaining the statutory and regulatory requirements for a fee agreement under the Title).

144. *Id.* § 5904(c)(3). *See* Scates v. Principi, 282 F.3d 1362, 1366 (Fed. Cir. 2002) ("An attorney with a contingent fee contract . . . may receive only a fee that fairly and accurately reflects his contribution to and responsibility for the benefits awarded.").

145. 38 U.S.C. § 5904(c)–(d).

146. *Scates*, 282 F.3d at 1367 (emphasis added).

147. 38 U.S.C. § 5904(c)(3)(A); 38 C.F.R. § 14.636(i) (2017).

and not to whether the requirements for withholding and payment of a fee have been met under 38 U.S.C. § 5904(d).[148] Congress authorized review of the fee agreement for excessiveness or unreasonableness but did not authorize any other review by the Secretary.[149]

In *Scates*, the Federal Circuit held that upon discharge of an attorney or agent, 38 U.S.C § 5904(d) does not "automatically" entitle the attorney or agent to the agreed upon fee in the fee agreement; the fee becomes a matter that requires a factual determination.[150] Whether the claimant discharges the attorney or the attorney discontinues representing the claimant, the issues to be determined are the same.[151] It is important to understand that the decision in *Scates* did not direct the VA to make fee decisions to determine compliance with the statutory provisions under § 5904(d) for eligibility or entitlement to charge a fee. Both *Scates* decisions merely directed the VA to make a decision on the amount of the fee when an agent or attorney had been discharged.[152] The current VA practice is to assume that any time an agent or attorney has been discharged that a decision by the VA will be made, regardless of whether the claimant requests such a decision.[153]

V. THE CONFLICT BETWEEN CONGRESSIONAL INTENT AND VA PRACTICE

Congress unambiguously afforded claimants the right to request review of the fee sought in a fee agreement to determine whether the fee called for in the fee agreement is reasonable or excessive.[154] Congress did not expressly direct the Secretary—when making eligibility or entitlement decisions—to include whether a fee agreement meets the requirements of statute and regulation for the Secretary to be obligated to withhold and pay fees.[155] Nevertheless, as a result of the decisions in *Scates*, the Secretary has informally adopted, without public notice and comment rulemaking, procedures for making eligibility decisions.

The Secretary determines eligibility by deciding whether the fee agreement meets the requirements of statute and regulation for the

148. 38 U.S.C. § 5904(c)(3)(A), (d); 38 C.F.R. § 14.636(i).

149. 38 U.S.C. § 5904(c)(3)(A).

150. *Scates*, 282 F.3d at 1366.

151. *See id.*

152. *Id.*; Scates v. Gober, 14 Vet. App. 62, 65 (2000).

153. *See* Stacy L.Z. Edwards, Comment, *The Department of Veterans Affairs' Entitlement Complex: Attorney Fees & Administrative Offset After* Astruve v. Ratliff, 63 ADMIN. L. REV. 561, 577 (2011) ("VA assured veterans that, despite ousting attorneys from the initial stages of benefits adjudication, it remained committed to a paternalistic system.").

154. 38 U.S.C. § 5904(c)(3)(A).

155. *See id.* § 5904(c)–(d) (discussing the payment and withholding of fees).

Secretary's obligation to withhold the fee called for in the fee agreement for payment of the agent or attorney's fees.[156] In addition, but only upon motion of the claimant or the Office of the General Counsel, the question of the reasonableness or excessiveness of the agreed upon fee can be addressed based on the discontinuance of the contract by one party or the other.[157] However, the current practice of the Secretary is not to make eligibility or entitlement decisions on fee agreements that do not call for withholding.[158]

To be clear, the Secretary has the authority under 38 U.S.C. § 511(a) to decide an agent or attorney's eligibility or entitlement to charge a fee, and to include whether a fee agreement meets the requirements of statute and regulation for the Secretary to be obligated to withhold and pay fees. However, the procedures by which such decisions are made should have been subject to notice and comment rulemaking and not merely set out in the VA's Adjudication Procedural Manual M21–1 that does "not amount to a [5 U.S.C.] § 553 rulemaking and do[es] not carry the force of law."[159]

Congress explicitly created a statutory presumption that a fee of twenty percent or less is presumptively reasonable.[160] This presumption applies to both withholding as well as non-withholding fees.[161] The Secretary also has promulgated a regulation that provides that "[f]ees which do not exceed 20 percent of any past-due benefits . . . shall be presumed to be reasonable. Fees which exceed 33 1/3 percent of any past-due benefits awarded shall be presumed to be unreasonable."[162] Thus, a fee called for in the fee agreement that is either twenty percent or less is presumptively reasonable.[163] If the fee called for in a withholding agreement is presumptively reasonable, then why is a decision from the Secretary needed?

The Court of Veterans Appeals in *In re Fee Agreement of Vernon* addressed the issue of the presumption of reasonableness as follows:

> The Court concludes that the appellant's lay assertions regarding the value and extent of the legal services rendered by counsel are insufficient, *as a matter of law*, to rebut that presumption. [Referring to

156. 38 C.F.R. § 14.636(c) (2017).
157. *See id.* § 14.636(i).
158. *Id.* § 14.636(f) (discussing fee agreements that may be presumed reasonable).
159. Disabled Am. Veterans v. Sec'y of Veterans Affairs, 859 F.3d 1072, 1077 (Fed. Cir. 2017).
160. 38 U.S.C. § 5904(a)(5) (2012).
161. *See id.* (declining to distinguish between withholding and non-withholding fees).
162. 38 C.F.R. § 14.636(f). The section goes on to note that "these presumptions may be rebutted through an examination of the factors in paragraph (e) of this section." *Id.*
163. 38 C.F.R. § 14.636(f).

> the regulatory presumption that a fee of 20% or less is presumptively reasonable] . . . Contrary to the Secretary's argument, a remand for application of the "factors" set forth at 38 C.F.R. §20.609(e) would serve no purpose. These regulatory factors, which may be considered by the Board in determining whether fees are reasonable, have no application unless the presumption of reasonableness has first been rebutted.[164]

A compliant fee-withholding agreement, as a matter of law, triggers the Secretary's duty to withhold the fee agreed upon from the veteran's award of past-due benefits and pay that fee to the agent or attorney.

What is missing, and what is required from the Secretary, is public notice and comment rulemaking to set out the Secretary's procedures for initiating eligibility or entitlement decisions, including whether the fee called for meets the statutory and regulatory requirements for the Secretary to withhold;[165] in particular, to explain the Secretary's current practices for when such decisions are made and when and why they are not made.[166] The Secretary has, in 38 C.F.R. § 14.636(i), demonstrated his ability to set out the procedures that must be followed to initiate the review of a fee for reasonableness and excessiveness.

It has been seventeen years since the decision of the Veterans Court in *Scates v. Gober*.[167] It has been fifteen years since the Federal Circuit's decision in *Scates v. Principi*.[168] During this time, the VA has not promulgated any regulations concerning the procedures required for an eligibility or entitlement decision, including whether the fee called for in the fee agreement meets the statutory and regulatory requirements for the Secretary to withhold a fee from a veteran's award of past-due benefits. Neither veterans, agents, or attorneys know when or why an eligibility or entitlement decision is to be made; as compared to the procedures specified in 38 C.F.R. § 14.636(i) to review a fee for reasonableness, which attempts to provide specific time frames and requires written notice by the veteran to the agent or attorney and a description of how the decision will be made and by whom.[169] In contrast, agents or attorneys are not aware of when a fee decision on eligibility will be issued and are not provided notice when the veteran files a notice of disagreement with

164. 8 Vet. App. 457, 459 (1996) (emphasis added) (first citing 38 C.F.R. § 20.609(e) (2017); and then citing *In re* Smith, 4 Vet. App. 487, 492 (1993)).
165. 5 U.S.C. § 553(b)–(c) (2012).
166. *Id.* § 553(b)(3).
167. 14 Vet. App. 62, 62 (2000).
168. 282 F.3d 1362, 1362 (Fed. Cir. 2002).
169. 38 C.F.R. § 14.636(i) (2017).

that decision.[170]

The Secretary needs to promulgate regulations addressing the Secretary's procedures for making eligibility or entitlement decisions that include deciding whether the fee called for in the fee agreement meets the statutory and regulatory requirements for the Secretary to withhold a fee from a veteran's award of past-due benefits. In particular, the Secretary needs to include a time frame in which his decisions will be made; for example, that a decision will be made within sixty days of the decision awarding past-due benefits. The Secretary's regulation must clearly state that an eligibility or entitlement decision, that includes whether the fee called for in the fee agreement meets the statutory and regulatory requirements for the Secretary to withhold a fee from a veteran's award of past-due benefits, *is not* the same as a motion for review of a fee agreement for reasonableness by the Secretary under 38 U.S.C. § 5904(c)(2).

Additionally, the Secretary must address the following matters in his existing regulations. First, the Secretary must define what the "final VA action" is, referenced in 38 C.F.R. § 14.636(i), which starts the 120 day time period for filing of a motion to review the amount of the fee called for in a fee agreement for reasonableness. Further, the Secretary must define the terms "excessive" and "unreasonable" as used in 38 U.S.C. § 5904(c)(2). The Secretary should clarify that a claimant has the right to request review of a fee agreement for reasonableness under 38 U.S.C. §14.636(i) even if a fee agreement meets the requirements of 38 U.S.C. §5904(d) requiring the Secretary to withhold the fee called for in the fee agreement when the requirements for withholding have been met. The Secretary's regulations must describe what happens when an agent or attorney is discharged by a claimant or withdraws before an award of past-due benefits has been made; specifically, that the claimant remains liable under the fee agreement but the agent or attorney must account for the time and efforts on behalf of the claimant, only if there is a request for review made under 38 C.F.R. § 14.636(i). The Secretary's regulations must describe how a fee will be apportioned when the claimant executes more than one fee agreement on the same case. Finally, the Secretary's regulations must set out a specific procedure for the settlement of disputes over the amount of the fee to be paid.

170. *See* 38 U.S.C. § 7105(b)(2) (describing the procedures for filing a notice of disagreement without mention of providing notice to the agent or attorney).

CONCLUSION

The representation of veterans and claimants before the VA is already a practice fraught with hurdles for agents and attorneys. The law is complex and the delay is frustrating but the alternative is having veterans try to overcome these hurdles themselves. There are already too many veterans not getting the representation they need to obtain their benefits. It is imperative that the Secretary discontinue the practice of unnecessarily delaying payment of fees to agents and attorneys in cases where the requirements of 38 U.S.C. § 5904(d) have been met.[171]

171. Of note, the VA's May 2017 budget for fiscal year 2018 included a request to eliminate direct payment fees from the VA to agents and attorneys. If this were implemented, it would moot the issue addressed in this article but would not eliminate the problem, ensuring that attorneys and agents are not dissuaded from representing veterans by the failure to protect their ability to collect fees. U.S. DEP'T VETERANS AFF., ANNUAL BUDGET SUBMISSION 22 (2017), https://www.va.gov/budget/docs/summary/fy2018VAbudgetVolumeIsupplemental Information AndAppendices.pdf.