

NOTE: This disposition is nonprecedential.

United States Court of Appeals for the Federal Circuit

ALLEN GUMPENBERGER,
Claimant-Appellant

v.

**DENIS MCDONOUGH, SECRETARY OF
VETERANS AFFAIRS,**
Respondent-Appellee

2022-1887

Appeal from the United States Court of Appeals for
Veterans Claims in No. 20-4155, Judge Grant Jaquith,
Judge Joseph L. Falvey, Jr, Judge Michael P. Allen.

Decided: March 25, 2024

KENNETH M. CARPENTER, Law Offices of Carpenter
Chartered, Topeka, KS, argued for claimant-appellant.

BRITTNEY M. WELCH, Commercial Litigation Branch,
Civil Division, United States Department of Justice, Wash-
ington, DC, argued for respondent-appellee. Also repre-
sented by BRIAN M. BOYNTON, ELIZABETH MARIE HOSFORD,
BORISLAV KUSHNIR, PATRICIA M. MCCARTHY; SHEKEBA
MORRAD, CHRISTA A. SHRIBER, Office of General Counsel,

United States Department of Veterans Affairs, Washington, DC.

Before PROST, STOLL, and STARK, *Circuit Judges*.

STOLL, *Circuit Judge*.

This case is about attorney or agent fees. Allen Gumpenberger, an agent, seeks fees for his representation of veteran Arturo Valadez. Specifically, Mr. Gumpenberger seeks fees for past-due benefits the Department of Veterans Affairs (VA) awarded Mr. Valadez for his traumatic brain injury (TBI). The Board of Veterans' Appeals denied Mr. Gumpenberger's request for fees under 38 U.S.C. § 5904(c)(1) (2012) and the United States Court of Appeals for Veterans Claims affirmed. *Gumpenberger v. McDonough*, 35 Vet. App. 195 (2022) (*Decision*). We agree with the Veterans Court's interpretation of the fee statute, and thus affirm.

BACKGROUND

Mr. Valadez served honorably in the United States Marine Corps and has received VA benefits for many conditions related to his service. In June 2010, Mr. Valadez and Mr. Gumpenberger entered into a fee agreement of "20 percent of all past due benefits awarded to [Mr. Valadez] as a result of winning [his] appeal." J.A. 30. This agreement "relates to any and all services provided on [Mr. Valadez's] behalf . . . with respect to an appeal . . . where a notice of disagreement was filed." *Id.*

In July 2010, Mr. Gumpenberger filed the fee agreement with the VA and sought to establish service connection for TBI and entitlement to individual unemployability (TDIU) for Mr. Valadez. In April 2013, a VA regional office (RO) issued a rating decision granting Mr. Valadez a 70% disability rating for TBI, as well as several TBI residuals, and denying entitlement to TDIU. The RO denied TDIU because Mr. Valadez was "considered capable of obtaining

GUMPENBERGER v. MCDONOUGH

3

and maintaining gainful employment.” J.A. 53. In May 2013, the RO sent Mr. Valadez a letter confirming the 70% disability rating for his service-connected TBI, granting service connection for other conditions like migraine headaches, and denying service connection for his acquired psychiatric disorder to include major depressive disorder and depression with alcohol dependence.

Mr. Gumpenberger then filed a notice of disagreement (NOD) for Mr. Valadez to appeal the denial of (1) entitlement to TDIU and (2) service connection for acquired psychiatric condition. In August 2014, the RO issued a statement of the case listing TDIU and the service connection for acquired psychiatric condition as the only two issues on appeal. In October 2014, Mr. Gumpenberger completed Mr. Valadez’s appeal by filing a VA Form 9. Then, in December 2015, Mr. Gumpenberger wrote to the VA that Mr. Valadez is “seeking entitlement to [TDIU] from July 27, 2010, to resolve all issues on appeal.” J.A. 111. And because “the symptoms of psychiatric impairments greatly overlap symptoms of TBI, at this point [Mr. Gumpenberger is] withdrawing that issue from appeal.” J.A. 111.

About seven months later, in July 2016, the VA informed Mr. Valadez, cc’ing Mr. Gumpenberger, that it was conducting a special review of TBI examinations in support of disability compensation claims for TBI. “This review revealed a number of initial TBI exams that were not conducted by a neurologist, psychiatrist, physiatrist, or neurosurgeon,” including Mr. Valadez’s initial TBI exam. J.A. 112. The VA therefore offered Mr. Valadez the option of undergoing a new TBI exam by an appropriate specialist. Under this option, the VA could reprocess Mr. Valadez’s

prior TBI claim. Mr. Valadez requested reprocessing under the VA's special TBI review.¹

Subsequently, in September 2016, the VA assigned a 100% schedular evaluation for Mr. Valadez's TBI effective from July 27, 2010. The VA also granted Mr. Valadez special monthly compensation based on housebound criteria and eligibility to Dependents' Educational Assistance, effective from July 27, 2010. The evidence the VA considered was: (1) a VA 21-0820 Report of General Information, received on July 26, 2016; (2) a VA letter concerning Mr. Valadez's exam, dated July 29, 2016; and (3) a DBQ NEURO TBI Initial, received on August 16, 2016.

Mr. Gumpenberger sought fees from the September 2016 rating decision that increased TBI rating from 70% to 100%. The RO denied fees, noting that Mr. Gumpenberger specifically withdrew TBI from Mr. Valadez's appeal and that Mr. Valadez's TBI claim was reprocessed per Secretary of Veterans Affairs authority to reward equitable relief.² The RO reasoned that the

¹ In the briefing before our court, Mr. Gumpenberger states that he requested reprocessing of Mr. Valadez's claim under the special TBI review. Appellant's Br. 4 (citing J.A. 114). The Veterans Court and Board, however, describe the *veteran* as responding to the VA's letter. J.A. 3 (Veterans Court), 175 (Board). Also, during oral argument before the Veterans Court, Mr. Gumpenberger's attorney could not point to anything that Mr. Gumpenberger did to assist Mr. Valadez in obtaining an increase in schedular rating for TBI. We recite the facts as stated by the Veterans Court.

² The Veterans Court recognized that Mr. Gumpenberger "expressly withdrew the issue of the veteran's *psychiatric claim* from the appeal, not TBI, which [Mr. Gumpenberger] did not include in his NOD." *Decision*, 35 Vet. App. at 200 n.15 (emphasis added).

“resultant favorable decision [was] not due to an appeal, so direct payment of fees [was] denied.” J.A. 136. Mr. Gumpenberger filed a NOD, explaining that the VA misinterpreted his withdrawal letter and that the issue of an increase in evaluation to total was still on appeal. The RO issued a statement of the case, continuing to deny entitlement to a fee. Mr. Gumpenberger then appealed to the Board.

The Board concluded that fees were not warranted. The Board reasoned that no NOD was filed for TBI, the evaluation for TBI was “based on the VA’s own internal review of TBI examinations,” and a grant of a 100 % for TBI is not the same as a grant of TDIU in this case, which was what was sought in the NOD. J.A. 176. Mr. Gumpenberger then appealed to the Veterans Court.

The Veterans Court affirmed the Board’s decision. *Decision*, 35 Vet. App. at 199. The court began by recognizing that both parties agree 38 U.S.C. § 5904(c)(1) (2012) applies. *Id.* at 203. That statute states:

(c)(1) Except as provided in paragraph (4), in connection with a proceeding before the Department with respect to benefits under laws administered by the Secretary, 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*. The limitation in the preceding sentence does not apply to fees charged, allowed, or paid for services provided with respect to proceedings before a court.

§ 5904(c)(1) (2012) (emphases added). The Veterans Court analyzed the scope of a NOD under 38 U.S.C. § 7105 and 38 C.F.R. § 20.201, general provisions governing NODs, before turning to 38 U.S.C. § 5904(c)(1) and the phrase “with respect to the case.” *Decision*, 35 Vet. App. at 203–11.

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