UNITED STATES COURT OF VETERANS APPEALS

No. 94-657

ON MOTION OF WILLIAM G. SMITH, ESQUIRE,
TO REVIEW A FEE AGREEMENT IN CASE
NUMBER 91-1496

(Decided August 30, 1994)

William G. Smith, Esquire.

Before NEBEKER, *Chief Judge*, and FARLEY and MANKIN, *Judges*.

NEBEKER, *Chief Judge*: In an opinion dated October 22, 1993, the Court ordered the dismissal of the appeal of Ms. Lois B. Lyon from a May 14, 1991, decision of the Board of Veterans' Appeals (Board or BVA) for lack of jurisdiction. *Lyon v. Brown*, 5 Vet.App. 507 (1993). On November 9, 1993, the appellant's attorney, William G. Smith, filed a motion for review of the fee agreement he entered into with Ms. Lyon. Because the matter raised by Mr. Smith's motion is distinct from the issues presented by Ms. Lyon's appeal, the Clerk has been directed to docket this matter separately.

Pursuant to his written agreement with Ms. Lyon, Mr. Smith received a fixed fee of $2,000.00 in addition to a contingency fee of 20% for any retroactive recovery. Mr. Smith, concerned about criminal liability and citing 38 U.S.C. § 7263(c), requests that the Court review the fee agreement in order to determine whether he is required to make a refund since the Court dismissed the appellant's appeal due to lack of jurisdiction. The contingency fee is not at issue, and Ms. Lyon has notified the Court that she does not object to the fixed fee. The Court, having reviewed the motion, declines to exercise its review prerogative because the possibility of criminal liability is so remote as to be virtually nonexistent, and, in any event, our determination of reasonableness or unreasonableness would probably not be controlling.

I. FACTS

On January 7, 1994, the Court issued an order directing Mr. Smith or the appellant to show cause as to why Mr. Smith's motion for review of the fee agreement should not be dismissed for lack of a case or controversy. On January 28, 1994, Mr. Smith responded to the Court's order by arguing that the very language of 38 U.S.C. § 7263(c) creates a cause of action without requiring a case or controversy.

On February 8, 1994, the Court issued an order directing Mr. Smith to advise the Court whether the appellant has actual notice of the motion for review of the fee agreement filed by Mr. Smith and what position, if any, she takes as to that motion. On February 22, 1994, Mr. Smith revealed that the appellant was notified of the motion but does not desire a refund of the fee which she paid him. Mr. Smith submitted a letter written by the appellant in which she states, "We have discussed [the fee agreement] and are still in full agreement with our original fee agreement[,] which I have always felt was fair, and do not intend to contest . . . ."

II. ANALYSIS

Pursuant to 38 U.S.C. § 7263(c):

> 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. The Court, on its own motion or the motion of any party, may review such a fee agreement.

The permissive nature of this provision vests in the Court discretion whether to review a fee agreement. This is so whether we are requested to do so, as in this instance, or we act on our "own motion." *See, e.g.*, *Lewis v. Brown*, 5 Vet.App. 151, 154 (1993) (Court will not ordinarily review fee agreement sua sponte).

Mr. Smith is solely concerned with the possibility of criminal prosecution under 38 U.S.C. § 5905. ("Counsel appearing in good faith before this Court should not be left guessing as to whether they have committed a criminal act in so doing." Response to Court's February 8, 1994, Order at 2.) Section 5905 provides in pertinent part that,

> [w]hoever (1) directly or indirectly solicits, contracts for, charges, or receives . . . any fee or compensation except as provided in sections 5904 or 1984 of this title, or (2) wrongfully withholds from any claimant or beneficiary any part of a benefit or claim allowed and due to the claimant or beneficiary, shall be fined . . . or imprisoned . . . or both.

Thus, the only way that an attorney could be subject to criminal penalties for a fee agreement for representation before this Court is if the requirements of section 5904 apply to such a fee agreement and those requirements are not met. (38 U.S.C. § 1984 has no bearing on this discussion since it

deals with insurance disputes.) The Court notes first that clause (2) of section 5905 in no way pertains to fee agreements filed with this Court, or indeed to fee agreements for any representation, since it only contemplates instances wherein someone has wrongfully withheld benefits or a claim due the claimant, not where someone has contracted to withhold benefits or a claim due as a condition to representation.

Second, the provisions of section 5904 have no bearing on fee agreements for representation before this Court. The fee agreements addressed in section 5904 are those for representation in VA proceedings only. The sole requirements for agreements limited to fees for representation before the Court are set forth in section 7263(c) and (d) -- i.e., that such fee agreements shall be filed with the Court and that they are reviewable by this Court alone for reasonableness.

That section 5904's restrictions on fee agreements apply only to fee agreements for representation before VA and/or the BVA is clear from the language of the statute itself. Subsections (a) and (b) of section 5904 deal with who may represent a claimant before the Secretary and how and when an agent or attorney may be barred from further practice before the Department. Section 5904(c)(1) applies only to proceedings "before the Department" and expressly provides that "th[is] limitation [of allowing fees only in cases where representation was retained before one year after the first final BVA decision] does not apply to services provided with respect to proceedings before a court." Section 5904(c)(2) applies only to representation "before the Department or the [BVA] . . . ." This subsection provides that the BVA may review such fee agreements and that this Court may review the BVA's findings or orders after it conducts its review of such agreements. Section 5904(c)(3), regarding loan cases, also specifically applies to proceedings "before the Department."

Section 5904(d)(3) does include past-due benefits awarded by, inter alia, this Court. An argument might be made that fee agreements for representation before this Court are included in section 5904(d)(3) based on the fact that the Secretary is forbidden by this subsection to "withhold for the purpose of such payment any portion of benefits payable for a period after the date of the final decision of the Secretary, the [BVA], or Court of Veterans Appeals making . . . the award." However, this argument is untenable since section 5904(d)(3) is a command to the Secretary only.

The statutory construct of the fee agreement provisions makes clear that fee agreements before the Board or the Department and those before this Court are completely separate. The Veterans' Judicial Review Act, Pub. L. No. 100-687, 102 Stat. 4105 (1988) (VJRA), this Court's organic act, was divided into different titles. Title I, "Adjudicative and Rulemaking Authority of the Veterans Administration," contained what are now sections 5904 and 5905 of title 38 of the U.S. Code. Section 7263, the fee agreement provision for representation before this Court, was contained in Title III of the VJRA entitled "U.S. Court of Veterans Appeals." There was no criminal provision

contained in Title III of the VJRA and none has been added by subsequent amendment to chapter 72 of title 38 of the U.S. Code. Thus, even if we were to find that, pursuant to section 7263, a fee agreement for representation before this Court was unreasonable, no criminal penalties appear to apply.

III. CONCLUSION

We are mindful of the strict construction principle universally applicable to criminal proscriptions. *See, e.g.*, *Busic v. United States*, 446 U.S. 398, 406 (1980); 3 NORMAN SINGER, SUTHERLAND'S STATUTORY CONSTRUCTION § 59.03 (5th ed. 1992). Under section 7263, the possibility of criminal liability is virtually nonexistent. That being so, Mr. Smith's concerns are insufficient to prompt this Court to take the extraordinary step of reviewing the fee agreement, which Ms. Lyon commendably endorses. We see no other ground which compels us to review the fee agreement he entered into with his client, and so Mr. Smith's motion is hereby DENIED.

Issued with this opinion is a separate order of the en banc Court denying a suggestion by Judge Steinberg for en banc consideration of Mr. Smith's motion. We note that the suggested guidance the non-panel member deems so advisable would hardly shed general light for future fee agreements. This case presents, as he observes, a change of jurisdictional law after the fee agreement was entered into. Thus, the case is so unique that to do as he suggests would shed such a narrow single beam of light as to be incapable of the illumination seemingly so important to him. Moreover, our colleague's suggestion that the panel erred in not addressing *In re Fee Agreement of Wick*, 4 Vet.App. 487, 502 (1993), is based on an erroneous understanding of what the Court held in that case.