



FULFILLING OUR PROMISES
TO THE MEN AND WOMEN WHO SERVED

NONPROFIT ADVISOR

For DAV Departments and Chapters

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WHAT ABOUT ATTORNEYS AND THEIR FEES?

On Dealing With Attorneys, VA Claims and Fees

For weal or woe, the United States Court of Appeals for Veterans Claims (CAVC) is now twenty-five years young, or old, depending on your point of view. As promised at the outset, and delivered year after year, DAV has been the most prominent veterans service organization at CAVC since its inception.

Many veterans remain confused about the role of attorneys in the VA claims process now that judicial review has become a fully integrated part of the benefits adjudication system. This newsletter attempts to answer some of the more commonly asked questions.

Is there any good reason to use an attorney (and not DAV) to represent me at VA ?

There may be a good reason to engage a lawyer instead of DAV. However, we have not yet found that reason.

Weren't attorneys barred from representing veterans at VA for a long time?

Attorneys were never so barred. For more than 150 years, there has been some kind of limitation on the fee that an attorney can charge a veteran. The limitation has eased considerably in recent years, but is still there and is still meaningful.

Can an attorney charge me for filing an initial claim?

No. The pertinent statute clearly states that no fee may be charged for representation on any claim until the filing of a Notice of Disagreement (NOD) following an initial adverse decision. There is, however, a VA General Counsel opinion stating that attorneys may charge a fee for pre-filing consultations that occur *prior* to an initial claim for benefits. Some lawyers may use this as a way of skirting the no-fee rule. **This is just one of many reasons to use DAV's outstanding service officers for representation in all matters before the VA, whether on initial claim, appeal or remand.**

How much can the attorney charge me?

The fees "may be based on a fixed fee, hourly rate, a percentage of benefits recovered or [some combination thereof]." In addition, the fees must be reasonable. VA presumes that fees up to 20% of past-due benefits are reasonable and that fees in excess of 33 1/3% of past-due benefits are unreasonable. Fee agreements for representation at VA must be filed with the Office of the VA General Counsel.

Will VA pay my lawyer directly out of past-due benefits?

The VA will do this only if a properly-filed fee agreement that you and your attorney have signed authorizes it and, even then, only if the fee is limited to 20% of past-



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due benefits and when the fee is a purely contingent (“no win, no pay”) obligation. This direct-payment provision is favored by attorneys and is probably the single most influential factor in the limitation of attorney fees.

What about representation at the Board of Veterans Appeals?

The BVA is part of the VA and the same rules apply.

Do the fee rules change if I must appeal my case to the United States Court of Appeals for Veterans Claims?

An attorney fee agreement for representation at CAVC must be filed with the court. Generally speaking, the same type of fee arrangements that are permitted at VA are permitted at the court. In both venues, the overarching requirement is that the fee be “reasonable.”

At the court it may be possible for appellants (veterans) to recover attorney fees from the government if it turns out that the government’s position that lead to the appeal (i.e., the denial of benefits) was “substantially unjustified.” This fee recovery takes place pursuant to the “Equal Access to Justice Act” (EAJA). Many

attorneys will take a veteran’s case to CAVC and agree to work only for the EAJA fees, should they be awarded.

The bottom line is that you must read any attorney fee agreement very carefully. Get help from a third party if there is any aspect of the agreement that you do not understand. (By the way, DAV cannot be the third party.) When you sign a fee agreement, you enter into a binding contract that can be very difficult, if not impossible, to nullify.

What happens if the CAVC sends my case back to the VA for correction or additional action?

This outcome, which is quite routine, is called a REMAND. When your case is returned to VA, your DAV power of attorney automatically takes effect again. Many attorneys will seek to continue representing you at VA after a court remand. BE CAREFUL!!!!!! Just because an attorney represented you at CAVC does not mean that you must, or should, continue with that attorney at VA. Agency remands sometimes lead to large retroactive payments and, depending on the terms of your attorney representation agreement, you may be giving up a big chunk of that payment for the attorney to do something that your DAV National Service Officer will do for free!

Nonprofit Advisor is prepared by the Office of the DAV’s General Counsel and is published quarterly for the informational use of DAV Departments and Chapters. This newsletter is not intended to replace legal advice that may be required to address individual situations.