**DEPARTMENT OF VETERANS AFFAIRS**

**Veterans Benefits Administration (VBA)**

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***Duties of the Agent and Attorney Fee Coordinator (AAFC)***

*September 2015*

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**References for AAFC**

* [38](http://vbaw.vba.va.gov/bl/21/publicat/Letters/TrngLtrs.htm#2010) U.S. Code § 5901 – Prohibition against acting as claims agent or attorney
* 38 U.S. Code § 5902 – Recognition of representatives of organizations
* 38 U.S. Code § 5903 – Recognition with respect to particular claims
* 38 U.S. Code § 5904 – Recognition of agents and attorneys generally
* 38 U.S. Code § 5905 – Penalty for certain acts
* 38 CFR § 14.629 – Requirements for accreditation of service organization representatives; agents; and attorneys
* 38 CFR § 14.636 – Payment of fees for representation by agents and attorneys in proceedings before Agencies of Original Jurisdiction and before the Board of Veterans' Appeals
* 38 CFR § 3.103 – Procedural due process and appellate rights
* M21-1, I.3.A – General Information on Power of Attorney (POA)
* M21-1, I.3.C – Payment of Attorney or Agent Fees
* M21-1, III.ii.3.C.4 – Handling Power of Attorney (POA) Appointments
* M21-1, IV.ii.2.F – Compensation Based on Individual Unemployability (IU)
* M21-1, I.5.A – General Information on Appeals
* [Office of General Council Accreditation Website](http://www.va.gov/ogc/apps/accreditation/index.asp)
* [Office of General Council Accreditation FAQs](http://www.va.gov/ogc/accred_faqs.asp)

**Responsibilities and Duties of AAFC**

The primary duties of the AAFC are to:

•Serve as the liaison between accredited attorneys and agents and the Veterans Service Center (VSC), Pension Management Center (PMC), or other VA entities

•Review each case in which an agent or attorney has filed a VA Form 21-22a, to determine whether the individual is accredited

•Enter the applicable POA code for each agent or attorney who is accredited, and

•Code the case as sensitive level 7 per Office of Field Operations Letter 20F-12-04

In addition to the primary duties shown above, the AAFC will:

* Determine, prior to authorizing an award,
  + whether there is a valid direct-pay fee agreement as provided in [38 CFR 14.636(g)](http://www.ecfr.gov/cgi-bin/text-idx?SID=7c8f90d08160838eff7394bf01103d9e&mc=true&node=se38.1.14_1636&rgn=div8)
  + whether direct payment of fees can be honored as provided in [38 CFR 14.636(h)](http://www.ecfr.gov/cgi-bin/text-idx?SID=7c8f90d08160838eff7394bf01103d9e&mc=true&node=se38.1.14_1636&rgn=div8)
  + the appropriate amount to withhold from past due benefits (if any), and
  + if the agent or attorney is eligible to payment of fees from any past due benefits
* Ensure that the fee agreement is appropriately filed in the claims folder
* For a paper claims folder, back file the fee agreement on the right side of the claims folder along with [VA Form 21-22a](http://www.vba.va.gov/pubs/forms/VBA-21-22A-ARE.pdf)
* For an electronic folder (eFolder), use the ACTIONS drop down in Veterans Benefits Management System (VBMS) to edit properties and select the AGENT FEE AGREEMENT document type, and
* Enter the “Attorney fee” and “Potential Attorney Fee” flashes in Share (which also shows in VBMS)

*Notes*:

•If the agent or attorney is not accredited, the AAFC will

* Return the VA Form 21-22a to him/her with a letter of explanation, and
* Notify the claimant of this action in a separate letter

•The sensitive level 7 code (and any flashes that are required) should remain in place until the fee agreement is withdrawn by the representative or otherwise no longer requires withholding a portion of past-due benefits for possible payment of fees

•Fees may be payable even if the agent or attorney who signed the fee agreement is no longer the current representative

**System Updates**

System updates are critical to ensure that an attorney agent fee agreement isn’t overlooked during claims processing. The following system updates must be made after review by AAFC shows a valid fee agreement with an accredited attorney or agent:

1. Update POA name and access in VBMS (note: at present time POA CADD access can only be changed in SHARE)
2. Add applicable Corporate Flashes in SHARE (i.e. Attorney Fee, Potential Attorney Fee…)
3. Request ISO to code the case as sensitive level 7 per Office of Field Operations Letter 20F-12-04
4. For an electronic folder (eFolder), use the ACTIONS drop down in Veterans Benefits Management System (VBMS) to edit properties and select the AGENT FEE AGREEMENT document type

**What Constitutes a “Case”**

An original claim, a reopened claim, and a claim for increase are each separate “cases,” even if they address the same disability. Each request for DIC, Pension, or Death Pension is a separate “case.” Where the benefit sought is disability compensation, the case consists of an assertion of entitlement to compensation based on a specific disability.

* + Distinct and separate symptoms are distinct disabilities and, therefore, distinct cases.
  + However, different diagnoses assigned to the same symptoms do not represent different disabilities and, therefore, are not necessarily separate cases.

***Several examples can be found, in M21-1, I.3.C, to illustrate what constitutes a “case.”***

**Important:** A downstream issue is an issue which arises as a direct result of a favorable decision on an appealed issue and must be addressed by the decision maker. Any downstream issues will be considered a “case.” Although they may not be specifically claimed and/or appealed, downstream issues are subject to payment of attorney fees.

Example: A Veteran files an appeal for service connection (SC) for depression. When granting SC for depression, the DRO must address the following downstream issues

* disability evaluation
* effective date, and
* entitlement to any ancillary benefits that arise, based upon the evidence, such as
  + Individual unemployability (IU)
  + Dependents’ Educational Assistance, and/or
  + Special monthly compensation (SMC).

**Promulgation/Authorization**

The table below describes the process for paying attorney/agent fees directly from past-due benefits.

|  |  |  |
| --- | --- | --- |
| **Stage** | **Who Is Responsible** | **Description** |
| 1 | AAFC | Determines whether direct payment of fees is at issue by analyzing whether a valid direct-pay fee agreement that VA can honor has been timely submitted. |
| 2 | Veterans Service Representative (VSR) | Under review of the AAFC, prepares the claimant’s award, leaving it in a pending status. |
| 3 | AAFC | * Determines   + the amount of past due benefits awarded   + Computes the amount of past-due benefits to be withheld for fees in the event eligibility to fees is established. |
| 4 | AAFC | Requests the RO’s finance activity to establish a withholding of the amount payable. |
| 5 | Finance Activity | Establishes the withholding. |
| 6 | AAFC/Senior Veterans Service Representative (SVSR) | * Authorizes the award when the withholding appears in the corporate record, and * Notifies the claimant and his/her attorney/agent of the rating decision and award. |
| 7 | AAFC | * Determines whether the attorney/agent is eligible to receive fees, and * Notifies the claimant and his/her attorney/agent of the fee eligibility decision. |
| 8 | AAFC | When the appeal period expires (or any appeal is completed), asks the finance activity to release funds to the claimant or attorney/agent, according to the fee eligibility decision.  **Note**: If the NOD was received on or after June 20, 2007, the finance activity must withhold an assessment from the attorney/agent’s payment. |
| 9 | Finance Activity | Releases funds. |

**Computing the Fee Payable to the Attorney/Agent**

When calculating the amount of retroactive benefits due to an attorney/agent the AAFC will determine the percentage of benefits due to the attorney/agent and reduce that amount to account for an assessment fee. VA will charge and collect an assessment out of the fees paid directly to agents or attorneys from past-due benefits awarded. The amount of such assessment shall be equal to 5% of the amount of the fee required to be paid to the agent or attorney, but in no event shall the assessment exceed $100 (38 CFR. §14.636).

Past-due benefits are calculated ***from* the effective date of the award *to* the date of the decision** awarding benefits for any cases identified in the fee agreement. VA will only honor a direct pay fee agreement where the fee amount doesn’t exceed 20% of any retroactive benefits.

**Example 1**: After a Veteran is denied service connection for depression, she appeals the decision and submits a VA Form 21-22a with a valid fee agreement. The Veteran is awarded 30% on this appeal, and she is due a retroactive award of $20,000. The fee agreement calls for 20% to go to the attorney.

The total attorney fee is $4,000; however, we must reduce this amount by the assessment fee. **The total amount payable to the attorney is $3,900**. The assessment fee charged for this transaction is $100 because 5% of $4,000 ($4,000\*0.05=$200) exceeds the $100 limit.

**Example 2**: After a Veteran is granted service connection for a right knee condition at 10%, he appeals the decision for a higher evaluation and submits a VA Form 21-22a with a valid fee agreement for “20% of retro-active benefits.” While the appeal is pending he files a claim for his left knee secondary to his right knee. The Veteran is awarded an increase from 10% to 20% on this appealed right knee with retroactive benefits due in the amount of $800.

Two weeks later the RO decides in favor of the Veteran’s claim for his left knee as secondary to his right. This decision increases his overall disability percentage from 20% to 80% with retroactive benefits due in the amount of $12,000.

The total attorney fee payable for the increased compensation based on the appealed right knee is $160 ($800\*0.2=$160); however, we must reduce this amount by the assessment fee. **The total amount payable to the attorney is $152**. The assessment fee charged for this transaction is $8; 5% of $160 ($160\*0.05=$8) is below the $100 limit.

No attorney fee is payable for the left knee because no NOD was submitted for this condition. Note: The left knee condition was claimed and granted as secondary to the right knee, but the left knee is a different “Case” for the purposes of paying attorney fees.

**Example 3**: A Veteran is granted service connection for a right knee replacement at 10 percent, effective March 13, 2013; he is notified on May 27, 2014. On May 1, 2015 he submits an NOD with a VA Form 21-22a and a fee agreement for “25% of retro-active benefits.” A clear and unmistakable error was found and an evaluation of 30% is granted back to March 13, 2013.

Although retroactive benefits are payable to the Veteran, **direct pay attorney fees are not applicable in this case because the fee agreement exceeds 20%.** As provided in 38 CFR 14.636(h)(1)) a request for direct payment of fees, commonly referred to as a “direct-pay fee agreement,” will only be honored by VA when the total fee payable (excluding expenses) does not exceed 20 percent of the total amount of past-due benefits awarded.

**Example 4**: After a Retired Veteran is denied service connection for depression, she appeals the decision and submits a VA Form 21-22a with a valid fee agreement. The fee agreement calls for 20% to go to the attorney. The Veteran is awarded 30% on this appeal, but retroactive benefits ($20,000) are withheld due to receipt of her retired pay.

**No attorney fee is payable at this point**. Any attorney fee payable will be based on the amount (if any) payable upon receipt of an AEW (Audit Error Worksheet.)

\*\*\*If an AEW is issued and the Veteran is due $10,000, we would calculate the attorney fee based on the $10,000. The total attorney fee is $2,000 reduced by the assessment fee of $100. The actual amount payable to the attorney is $1,900. The assessment fee charged for this transaction is $100 because 5% of $2,000 ($2,000\*0.05=$100) is exactly the $100 limit.

\*If an AEW is not issued because the Veteran is not eligible for CRDP/CRSC then no payment will be sent to the attorney for the case.

Refer to the table below for how to calculate the amount of past due-benefits for the purpose of withholding amounts for potential direct payment of fees when the award requires a reduction or offset.

|  |  |
| --- | --- |
| **When the award requires a reduction or offset due to …** | **Then calculate past-due benefits based on the …** |
| * Incarceration, an overpayment, or * Survivor Benefit Plan payments   **Reference**: For more information on calculating past-due benefits in cases involving incarceration, see Snyder v. Nicholson, 489 F.3d 1213 (Fed Cir. 2007), which overruled some provisions of [VAOPGCPREC 12-93](http://www.va.gov/ogc/docs/1993/PRC12-93.DOC). | Pre-reduction amount. |
| * Military retired pay, severance or separation pay, or a judicial award, such as the required offset of benefits payable under [38 U.S.C. 1151](http://law.cornell.edu/uscode/html/uscode38/usc_sec_38_00001151----000-.html) after settlement of a tort claim.   **Note**: [38 CFR 14.636(h)(1)(iii)](http://www.ecfr.gov/cgi-bin/text-idx?SID=afc54df0c9fb0836ebffea08507fc6b2&mc=true&node=se38.1.14_1636&rgn=div8) specifically excludes military pay previously paid from the definition of “cash payment.” | Post-reduction amount. |

**Important notes**:

* In cases where the Veteran was in receipt of retired pay, and there is not past due benefit, the attorney cannot be paid (until a new AEW is received)
* In determining the amount used for past due calculations consider any issued Audit Error Worksheet (AEW).
  + If any of the past due benefits were withheld due to the Veteran’s receipt of military retired pay and an AEW is generated showing some or all of those withheld amounts should be released to the Veteran, the amounts to be released are subject to the direct-pay fee agreement.
  + If Defense Finance and Accounting Service (DFAS) later submits an AEW authorizing Concurrent Retirement and Disability Pay (CRDP)/Combat Related Special Compensation (CRSC) concurrent receipt for the issues successfully appealed, this will be considered a past due benefit and the attorney should receive attorney fees from this past due amount.

**Working with Finance and SSD to Withhold Fees**

After the attorney/agent fee is calculated the AAFC will draft a memorandum which is sent to the finance department with a copy of the award from VBMS-A or VETSNET to establish the withholding of the fees. After the finance activity has established the withholding in the master record – the claim must be reviewed again to determine if any discrepancy exists between the withholding established by finance and the amount established on the AAFC memorandum. If there is a discrepancy, the AAFC will contact the finance activity to determine why. When it is determined that the correct withholding is in place, the award can be authorized.

The body of the memorandum should include the following statement:

“Please withhold **[amount]** from the retroactive amount that will be generated by award of **[enter date of generate and display (GAD) award]** and establish an 18 transaction for this amount. When complete, please return the file to the AAFC **[name of AAFC]**.”

**Example of Initial Finance Memorandum**

Date: [xx/xx/xxxx]

To: Finance

From: [Name & Phone #] AAFC

Subject: Payment of Attorney/Agent Fees

File #: [xxx-xx-xxxx]

Payee: [00,10,...]

Please withhold **[amount]** from the retroactive amount that will be generated by award of **[enter date of generate and display (GAD) award]** and establish an 18 transaction for this amount. When complete, please return the file to the AAFC **[name of AAFC]**.

This award was generated [VBMS-A / C&P AWARDS].

Claim documents are located in VBMS/VVA (or) The attached paper claims file is attached for your review.

Thank you

**Note:** This memorandum can be forwarded to finance in paper format or via email. As there is no current policy requiring the memo to be sent in a specified format the preferred method will vary by station and should be discussed between the AAFC and finance personnel.

**When to Request Office of General Council Assistance**

A **reasonableness review** is an analysis and determination by OGC, initiated by a motion filed by the claimant/appellant (or by OGC’s own motion) for review under [38 CFR 14.636(i)](http://www.ecfr.gov/cgi-bin/text-idx?SID=7c8f90d08160838eff7394bf01103d9e&mc=true&node=se38.1.14_1636&rgn=div8), of whether an attorney fee meets the requirement in [38 CFR 14.636(e)](http://www.ecfr.gov/cgi-bin/text-idx?SID=7c8f90d08160838eff7394bf01103d9e&mc=true&node=se38.1.14_1636&rgn=div8) that fees be reasonable.

When conducting a reasonableness review, OGC rarely addresses issues of eligibility. OGC only addresses eligibility under [38 CFR 14.636(c)](http://www.ecfr.gov/cgi-bin/text-idx?SID=7c8f90d08160838eff7394bf01103d9e&mc=true&node=se38.1.14_1636&rgn=div8) when the fee agreement does not instruct VA to pay the fee directly out of past due benefits.

As contrasted with the bases for an appeal from a RO fee eligibility determination listed in [M21-1, Part I, 3.C.5.a](http://vaww.compensation.pension.km.va.gov/system/templates/selfservice/va_ka/#5a), a motion for a reasonableness review is appropriate when a claimant believes that

* the attorney or agent did not earn the fee called for in the fee agreement
* the fee is too high, or
* the fee is otherwise unreasonable.

A reasonableness review must also be requested when eligibility to fees from past due benefits is established for multiple attorneys and/or agents.

Although [38 CFR 14.636(i)](http://www.ecfr.gov/cgi-bin/text-idx?SID=7c8f90d08160838eff7394bf01103d9e&mc=true&node=se38.1.14_1636&rgn=div8) requires that a claimant’s motion be filed with OGC, when the claimant submits the following statements, immediately refer the matter to OGC for consideration as a request for reasonableness

* the attorney/agent fee amount or percentage is
  + excessive, or
  + unreasonable
* the attorney or agent did not earn the fee called for in the fee agreement
* the attorney or agent should be paid for fees only until the date the POA was revoked, or
* the claimant requests review for reasonableness, or
* the claimant does not want to pay the attorney or agent.

***Important***: The examples in this list are not exclusive. For example, a document styled as a NOD in response to a RO decision finding an attorney or agent eligible for fees may also state, or be reasonable read as stating, that the claimant desires

OGC reasonableness review POC: Erick Winford (October 2015) [erick.winford@va.gov](mailto:erick.winford@va.gov)

**Tips for Using OGC’s Website**

Here are some tips for using OGC’s website:  On the top portion where it says “Search Accredited Attorneys, Claims Agents or Representatives”, you can simply search by city or State.  You do not need to fill in all the boxes to search.

On the lower portion, under “Search Recognized Veterans Service Organizations,” you can obtain a list of all recognized veterans service organizations by clicking the search button without entering anything in the search fields.  If you double click on each organization, it will show you the name of all representatives with that organization.

***(Regarding fees, it is still possible for he/she to receive fees for work performed prior to the cancellation of his/her accreditation, even if the rating decision is issued after that date.  In these cases, proceed as you would when an attorney’s representation is terminated prior to the rating decision, i.e., the Mr./Ms. Attorney would be eligible for the full amount provided for in the direct pay fee agreement, but, if there is also another attorney eligible for fees, the case must be forwarded to OGC for a reasonableness determination.)***

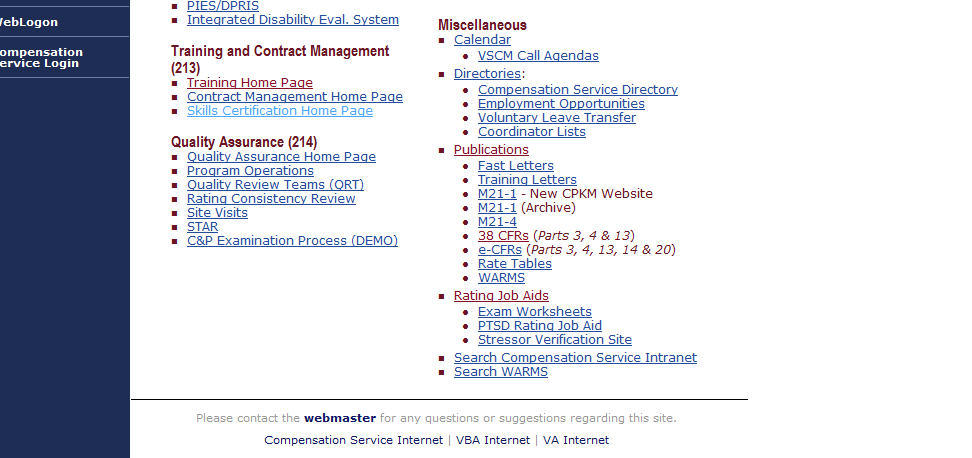
**Correspondence**

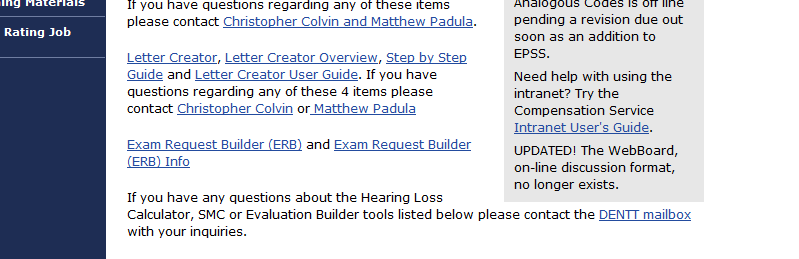
Communication with the Veteran and the Attorney/Agent is a primary function of the AAFC. The AAFC should use the letter creator to generate letters to both the Veteran and the Attorney/Agent.

Seven letters are currently available in the Letter Creator:

1. 21-22a and Fee Agreement Acknowledgement Letter
2. Attorney not Acknowledged
3. Attorney Revocation
4. No Exclusive Contact
5. Fee Decision Notice – Compensation Exceeds Military Retired Pay
6. Summary of Case Fee Decision Notice
7. Debt to Veteran for Failure to Withhold Attorney Fee Letter

The letter creator can be found on the [Compensation Service Intranet Home Page](http://vbaw.vba.va.gov/bl/21/index.htm) on the Ratings Job Aids page.





**FAQ**

1. **When to use the new “no cash payment” fee decision template (Exhibit 4)—Is this used for offset cases only?** This letter is used if there will be no cash payment to the claimant.  (Usually due to offsets.)
2. **When to use the “no valid POA” fee decision template (Exhibit1)—Is this for cases with fee agreements and no 21-22a that were overlooked at the time an award of past-due benefits comes due?** This could be the case, or not a “valid” POA for whatever reason (i.e. unnamed previously, not accredited, etc.).
3. **In what circumstances do we use the Exhibit 2 “No Fee Agreement or Valid POA(Survivor)” and Exhibit 3 “No NOD filed (Survivor)”? How does this relate to accrued benefits where the attorney had a valid fee agreement with the deceased veteran as well as a valid fee agreement with the survivor claimant? Does fee eligibility exist in such instances?** The letter sample used in Exhibit 2 is used when we had a valid fee agreement with the Veteran/claimant; however, the survivor does not have a valid fee agreement. The letter sample used in Exhibit 3 is used when there was not a NOD filed on the claim prior to the Veteran’s/claimant death. (M21-1 I.3.C.4.m)
4. **Should we use EP 290 (as specified in M21-1) or EP 400 (attorney correspondence as specified in M21-4 Appendix B) for tracking fee decision appeal periods?** Remember, EP 290 refers to processing these attorney fee cases, so use that when processing the attorney fee cases.  EP 400 is for attorney correspondence**.**
5. **The majority of the fee agreements are general contract that do not reference a particular Notice of Disagreement (NOD) or Appeal. Do these contracts extend to any NOD that is filed within a veteran’s lifetime?   For example, a fee agreement of record from September 1970 (came in with the veteran’s original claim- no NOD was filed at the time) however, the veteran was recently granted an appeal from 2008 and the attorney was paid a fee by the RO. The veteran had another appeal from 2014- he was granted- the fee agreement was overlooked so nothing was paid to the attorney. Is this fee agreement still valid? In this case the veteran also filed two 21-22’s with two different VSO appointed.**

It usually lasts for the life of the appeal for a particular condition. These fee agreements are part and parcel of the NOD, and are used for payment of past due benefits after an appeal is granted. Since there was no NOD on the original date, the older fee agreement would not be valid. In addition to the manual reference, you should read over 38 CFR 14.636. This reference should shed some light on these issues.

1. **There was a question about what to insert in the system (VBMS) if there is a POA of let’s say DAV or AL, and there is an attorney named for an appeal.  Is there precedence?**

Since the attorney represents the vet only on a single issue (and their review should be limited to that single claim), DAV should be the recognized POA in electronic systems since they are representing the vet on multiple issues.

1. **The manual reference says to use POA code 099.  What if the attorney has a specific POA code?  Can we use that or do we use POA code 099?**

|  |
| --- |
|  |

Update the claimant’s profile to include POA code 099 as a placeholder until the corporate database is updated.

Note: Once the POA code is updated in the corporate database, the ISO contacts the local AAFC to properly update the code in all VBA systems.

Reference: For more information on updating POA in Share, see M21-1, Part III, Subpart ii, 3.C.5.a. (M21-1III.ii.3.C.6.b. Adding POA Codes to Corporate)

1. **If a vet has an issue on appeal with regard to an increased evaluation for a condition, let’s say diabetes mellitus.  We granted peripheral neuropathy of bilateral upper extremities and SMC for loss of use for erectile dysfunction on a secondary basis to DMII.  Would we withhold for attorney fees in this case?  Can you provide some insight when we grant secondary issues to the issue under appeal?**

Diabetic complications may involve various body systems. In determining whether to address a disability in a rating decision as associated with diabetes mellitus, consider whether the disability is a residual or a manifestation of the diabetes mellitus or whether it represents a distinct diagnostic entity. Since diabetic complications refer to residuals of diabetes mellitus, there is no need to obtain a specific claim. It is presumed that diabetic complications are a progression of the disease. (M21-1 III.iv.4.F.2.a. Scope of Complications of Diabetes Mellitus) So in this example, attorney are payable because the complications are progression of the diabetes mellitus; which are covered under this fee agreement.

**I.5.A.1.f. Definition: Downstream Issue**

A downstream issue is an issue which arises as a direct result of a favorable decision on an appealed issue and must be addressed by the decision maker.

Example: A Veteran files an appeal for service connection (SC) for depression. When granting SC for depression, the DRO must address the following downstream issues

\* disability evaluation

\* effective date, and

\* entitlement to any ancillary benefits that arise, based upon the evidence, such as

\* individual unemployability (IU)

\* Dependents’ Educational Assistance, and/or

\* special monthly compensation (SMC).

Important: A decision on a downstream issue may or may not confer new appeal rights.

**I.5.A.1.g. Definition: Inextricably Intertwined**

An issue is inextricably intertwined with a matter(s) on appeal when a decision on that issue by the regional office (RO) could have a significant impact on the matter(s) under appeal.

Notes:

\* A decision has a significant impact on the matter under appeal when it tends to make it more or less likely that the benefit sought will be awarded.

\* All matters that are inextricably intertwined must be adjudicated before any determination by BVA may be made.

Example: An RO decision granted SC for depression at 10 percent disabling. The Veteran submitted an NOD with the evaluation of depression. During a conference with the DRO, the Veteran also alleges that her fibromyalgia was caused by her depression. The DRO issues a partial grant by increasing the evaluation of depression to 50 percent. The issue of SC for fibromyalgia secondary to the Veteran’s SC depression is inextricably intertwined with the issue of an increased rating for depression and must be adjudicated before BVA can address the issue of fibromyalgia.

1. **The fee agreement states the Veteran must pay $2,000 for work to commence, the VA is to withhold up to 20% and then the Veteran pays out of pocket an additional 5% percentage of the retro payment.  I know fee agreements are allowed to be above 20% but the VA will not withhold the retroactive pay if the fee agreement is above 20% and it is the attorneys responsibility.  If we award retroactive benefits, are we responsible for withholding 20% and leaving the attorney to collect the other 5%.  Or does collecting the entire fee fall on the attorney since the fee agreement technically spells out more than a 20% agreement?**

**I.3.C.1.g. Determining Whether Direct Payment of Fees Is at Issue**

A request for direct payment of fees, commonly referred to as a “direct-pay fee agreement,” will only be honored by VA when

* the total fee payable (excluding expenses) does not exceed 20 percent of the total amount of past-due benefits awarded
* the fee is contingent on a favorable outcome for the claimant, and
* the award of past due benefits results in a cash payment to the claimant or appellant from which the fee may be deducted.

Notes:

The “total fee payable” includes the fee to be paid by VA from past due benefits and any fee the claimant will pay the attorney directly.

Example: If the fee agreement provides that VA will pay a 20 percent fee to the attorney or agent out of past due benefits and the claimant will pay direct to the attorney or agent an additional 5 percent fee, the total fee payable is 25 percent of the total amount of past due benefits awarded. As a result, the fee agreement would not qualify for direct payment.

Expenses are not payable directly to the attorney or agent out of past due benefits.

1. **When an attorney is part of a firm, represents a client and then leaves the firm, should VA be involved in trying to get the firm to make payment of fees in the case to the attorney?**

This “firm” consists of (mostly) claims agents and not actual attorneys. A POA can only be an individual, not a firm. So, if an individual left the firm, we would still pay the individual. The VA Form 21-22a, box 7A, identifies the individual attorney/agent that is the claimant’s representative. This individual will also be identified on the fee agreement and is entitled to the fee from retroactive benefits.

1. **What occurs if there is a fee agreement for an attorney that subsequently has his/her accreditation cancelled?**

After that date, he/she cannot enter into a valid 21-22a and any 21-22a’s that he/she had in effect on that date must be considered revoked.  For individuals that had a 21-22a appointing the attorney on that date, send a notice similar to the following:

**Why We Are Sending This Letter**

Department of Veterans Affairs (VA) records show that you appointed attorney Joe/Jane Attorney as your representative before VA.  Joe/Jane Attorney is no longer accredited to represent claimants in claims before VA.

As stated in 38 CFR 14.629(b), no individual may act as an agent or attorney assisting claimants in the preparation, presentation, or prosecution of claims for VA benefits as an agent or attorney unless accredited by VA for such purposes.

We will continue to process your **[**claim **OR** notice of disagreement**],** unless youtell us otherwise.

**What You May Do**

You may either seek other representation or proceed without representation.

**How to Find an Accredited Representative**

To find an accredited attorney or agent, or an accredited representative of a recognized veterans service organization, you may wish to visit the Office of General Counsel’s (OGC’s) accreditation website at the following address: <http://www.va.gov/ogc/apps/accreditation/index.asp>.

**Training Case Scenarios**

Example 1:

* On August 4, 2008, the Veteran files a claim for depression. At that time, the Veteran was not receiving any VA benefits and did not have any other claims pending. The RO denied SC for depression and the Veteran filed a NOD. The Veteran submits a properly executed 21-22a and fee agreement assigning an attorney as his POA.
* On appeal, a DRO awards SC for PTSD effective August 4, 2008 citing symptoms that match those described in the claim for depression.

**Answer 1:** In this scenario, fees are payable and must be calculated, because the VA has granted service connection for PTSD. The VA decision describes symptoms that are similar in nature to those the Veteran described in his claim for service connection for depression.

Example 2:

* On August 4, 2008, the Veteran files a claim for SC for depression. The RO denied SC for depression and the Veteran filed a NOD. The Veteran submits a properly executed 21-22a and fee agreement assigning an attorney as his POA.
* While the appeal is pending, the Veteran submits evidence indicating that he has been unemployable due to depression since 2006. On the completed VA Form 21-8940, the Veteran indicates that depression is the disability that contributes to his unemployability.
* On appeal, a DRO awards SC for depression with a 70 percent rating and total disability based on IU effective August 4, 2008.

**Answer 2:** Attorney fees are payable in this example. Assuming the POA and fee agreement requirements are met, fees may be paid based on the award of the 70 percent and IU. In this situation, IU is not a separate case, but rather an attempt to obtain the appropriate disability initial disability rating.

Example 3:

* On February 13, 2010, the Veteran files a claim for increase in his SC PTSD. The RO denied the claim for increase SC for PTSD and the Veteran filed a NOD with a properly executed 21-22a and fee agreement assigning an attorney as his POA.
* While the appeal is pending on July 6, 2012, the Veteran submits evidence indicating that he has been unemployable due to his SC back and knee conditions since 2012.
* A RVSR awards an increase in the SC back and knee conditions with a total disability based on IU effective July 6, 2012.

**Answer 3:** Attorney fees are not payable in this example. The issues of: back, knee, and individual unemployability are not intertwined with the appeal issue of increase for SC in PTSD. Therefore, the attorney fees would not be payable in this grant of IU.

Example 4

* On February 23, 2012 the Veteran files a claim for increase in his SC Diabetes. The RO denied the claim for increase SC for Diabetes and the Veteran filed a NOD with a properly executed 21-22a and fee agreement assigning an attorney as his POA.
* During the VA examination for diabetes the doctor diagnosis peripheral neuropathy of the lower extremity and erectile dysfunction as a complication of diabetes.
* A DRO awards an increase in the SC diabetes, SC for peripheral neuropathy of lower extremities, and SMC for erectile dysfunction.

**Answer 4:** Attorney fees are payable from the retroactive pay for all of these conditions. Diabetic complications may involve various body systems. In determining whether to address a disability in a rating decision as associated with diabetes mellitus, consider whether the disability is a residual or a manifestation of the diabetes mellitus or whether it represents a distinct diagnostic entity. Since diabetic complications refer to residuals of diabetes mellitus, there is no need to obtain a specific claim. It is presumed that diabetic complications are a progression of the disease. (M21-1 III.iv.4.F.2.a. Scope of Complications of Diabetes Mellitus) So in this example, attorney are payable because the complications are progression of the diabetes mellitus; which are covered under this fee agreement.

Example 5

* On July 6, 2013 the Veteran files a claim for increase in his SC right knee condition. The RO denied the claim for increase SC for right knee and the Veteran filed a NOD with a properly executed 21-22a and fee agreement assigning an attorney as his POA.
* On February 12, 2015 the veteran submits a claim for SC for his left knee and back secondary to his SC right knee.
* A RVSR awards SC for left knee and back secondary to the right knee condition. The increase in SC for the right knee is still under the appeals process.

**Answer 5:** Attorney fees are not payable for the grant of SC for left knee and back. These conditions are granted secondary to SC for the right knee, but are not directly related to the increase in SC for that right knee. The left knee and back could be granted as secondary regardless of the disability percentage assigned to the right knee. Thee right knee remains the issue under the representation of the attorney fee agreement.

Example 6

* On July 1, 1985 the Veteran files a properly executed 21-22a and fee agreement assigning an attorney as his POA.
* On November 15, 2013 the veteran submits 21-526EZ claiming SC for hearing loss. The claim is denied and the veteran submits a NOD.
* On October 13, 2014 a DRO grants SC for hearing loss.

**Answer 6:** Attorney fees are not payable for this issue. The fee agreement would be tied to a particular NOD. No new fee agreement has been provided for the issue of hearing loss. There was no NOD at the time of the original submission of a fee agreement and 21-22a.

Example 7

* On August 12, 2010 the Veteran files a claim for SC prostate cancer. The RO denied the claim for SC prostate cancer and the Veteran filed a NOD with a properly executed 21-22a and fee agreement assigning an attorney as his POA.
* On October 30, 2012 a DRO grants SC prostate cancer at 100%, SMC “k” for erectile dysfunction and SMC “s” for housebound.

**Answer 7:** Attorney fees are payable for this case. The issues of SMC are intertwined with the grant of prostate cancer. These conditions therefore, are included within the scope of attorney fee agreement.

Example 8

* On June 4, 2011 the Veteran files an increase claim for SC right knee. The RO denied the increase claim for SC right knee and the Veteran filed a NOD with a properly executed 21-22a and fee agreement assigning an attorney as his POA.
* On March 15, 2012 a DRO grants SC on right knee for both extension and flexion; which, leads to an increase overall in the right knee percentage.

**Answer 8:** Attorney fees are payable for this case. The Veteran filed an increase claim for SC right knee. The DRO granted SC for both extension and flexion of the right knee. This is an increase in the Veterans SC for right knee.