### Section C. Payment of Attorney or Agent Fees

#### Overview

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| In this Section | This section contains the following topics: |

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| Topic | Topic Name |
| 1 (old 14) | General Information on Fees |
| 2 | Process for Paying Fees Directly From Past Due Benefits |
| 3 (old 15) | Withholding From Claimant’s Past-Due Benefits and Authorizing the Claimant’s Award |
| 4 (old 16) | Making an Attorney or Agent Fee Eligibility Decision and Sending Notification |
| 5 (old 17)  | Releasing Funds Withheld for Fees and Appeals of Eligibility Determinations |
| 6 | Reasonableness Review of Fees by Office of General Counsel (OGC) |
| 7 (old 18) | Failure to Withhold Past-Due Benefits |
| 8 | Exhibit 1: Decision Notice – No Valid Power of Attorney (POA) |
| 9 | Exhibit 2: Decision Notice – No Fee Agreement and/or Valid POA (Survivor) |
| 10 | Exhibit 3: Decision Notice – No Notice of Disagreement (NOD) Filed (Survivor) |
| 11 | Exhibit 4: Decision Notice – No Cash Payment to the Claimant |
| 12 | Exhibit5: Notice – Direct-Pay Fee Agreement Filed by More Than One Attorney/Agent  |
| 13 | Exhibit 6: Fee Recoupment Procedures – Final Notice |

#### 1. General Information on Fees

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| Introduction | This topic contains general information on fees, including the* authority for payment of fees
* unauthorized solicitation of fees
* appointment of the Agent and Attorney Fee Coordinator (AAFC)
* primary duties of the AAFC
* additional duties of the AAFC
* determining whether a valid fee agreement has been submitted, and
* determining whether direct payment of fees is at issue.
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| a. Authority for Payment of Fees | [38 CFR 14.636](http://www.ecfr.gov/cgi-bin/text-idx?SID=7c8f90d08160838eff7394bf01103d9e&mc=true&node=se38.1.14_1636&rgn=div8) authorizes Department of Veterans Affairs (VA) to make direct payment of fees to accredited agents and accredited attorneys. Under this regulation, accredited attorneys and agents may charge reasonable fees for representation provided before VA in a case only after * an agency of original jurisdiction (AOJ) has decided a claim, and a notice of disagreement (NOD) has been filed
* the agent or attorney has complied with the power of attorney (POA) requirements in [38 CFR 14.631](http://www.ecfr.gov/cgi-bin/text-idx?SID=7c8f90d08160838eff7394bf01103d9e&mc=true&node=se38.1.14_1631&rgn=div8), and
* the fee agreement requirements 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) have been satisfied.

***Notes***: * The Office of General Counsel (OGC) is responsible for accrediting attorneys and agents. E-mail questions regarding accreditation to the OGC at erick.winford@va.gov.
* Attorneys need not have been accredited under the current requirements in [38 CFR 14.626-14.637](http://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=02d2aa2ad3fb6c40d6063360e6297c36&mc=true&n=pt38.1.14&r=PART&ty=HTML#sg38.1.14_1619.sg6) if representation that was valid under the prior law was initiated, and the claim was filed, before the effective date of those regulations, June 23, 2008.
* Do not accept a NOD signed by an attorney or agent without a[*VA Form 21-22a, Appointment of Individual as Claimant’s Representative*](http://www.vba.va.gov/pubs/forms/VBA-21-22A-ARE.pdf) already on file or received at the same time as the NOD.
* Administrative debt collection proceedings and proceedings involving requests for waiver of indebtedness are considered proceedings involving Veterans’ benefits before VA.

***References***: For more information on* eligibility for direct payment of attorney or agent fees, see M21-1, Part I, 3.C.4
* who can file a NOD, see [38 CFR 20.301(a)](http://www.ecfr.gov/cgi-bin/text-idx?SID=a971bc15b7d4a6eaa90c3af6f780729e&mc=true&node=se38.2.20_1301&rgn=div8)
* extent of authority and duties of representatives, see M21-1, Part I, 3.A.4, and
* OGC’s list of accredited attorneys and agents, see <http://www.va.gov/ogc/apps/accreditation/index.asp>.
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| b. Unauthorized Solicitation of Fees | Individuals who are not accredited by VA as an attorney or agent may not solicit fees. Unauthorized representation of claimants and unlawful solicitation of fees is a serious matter and should be reported to the Outreach Staff Mailbox (VAVBAWAS/CO/OUTREACH). |

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| c. Appointment of the AAFC  | Each Veterans Service Center Manager (VSCM) and Pension Management Center Manager (PMCM) must appoint at least one AAFC. ***Notes***:* A list of AAFCs can be found on the Compensation Service web site at <http://vbacodmoint1.vba.va.gov/bl/21/CapLists/afc/afc_index.asp>.
* Offices should e-mail changes in AAFCs to the webmaster shown at the top of the AAFC webpage.
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| d. Primary Duties of the 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*](http://www.vba.va.gov/pubs/forms/VBA-21-22A-ARE.pdf)*,,* 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*](http://vbaw.vba.va.gov/bl/20/201/letters/2012/20F-12-04.DOC)*.*

***Notes***: * If the agent or attorney is not accredited, the AAFC will
* return the [VA Form 21-22a](http://www.vba.va.gov/pubs/forms/VBA-21-22A-ARE.pdf) 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.

***References***: For more information on* accreditation as a requirement to represent claimants, see M21-1, Part I, 3.A.2.a
* [*VA Form 21-22a*](http://www.vba.va.gov/pubs/forms/VBA-21-22A-ARE.pdf) and handling appointments, see M21-1, Part III, Subpart ii, 3.C.4 and
* Updating electronic systems with representative information, seeM21-1, Part III, Subpart ii, 3.C.5.
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| e. Additional Duties of the AAFC | 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).

***References***: For more information on * withholding past-due benefits, see M21-1, Part I, 3.C.3
* making a fee eligibility decision, see M21-1, Part I, 3.C.4
* the appropriate notice to send when the representative is not accredited, see *Attorney Not Acknowledged* in the [Letter Creator](http://vbacodmoint1.vba.va.gov/bl/21/LetterGenerator/LG.asp) on the [Rating Job Aids](http://vbaw.vba.va.gov/bl/21/rating/rat00.htm) page of the Compensation Service website, and
* handling POA appointments, see M21-1, Part III, Subpart ii, 3.C.4.
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| f. Determining Whether a Valid Fee Agreement has Been Submitted | To be valid under [38 CFR 14.636(g)](http://www.ecfr.gov/cgi-bin/text-idx?SID=7c8f90d08160838eff7394bf01103d9e&mc=true&node=se38.1.14_1636&rgn=div8) a direct-pay fee agreement must meet all requirements applicable to fee agreements generally. There are additional specific requirements for direct-pay fee agreements. The agreement must* be written and signed by
* the claimant or appellant, and
* the agent or attorney
* include
* the name of the claimant or appellant
* the name of any disinterested third party payer and the relationship between that individual and the claimant or the appellant
* the VA file number
* the specific terms under which the amount to be paid for the services of the agent or attorney will be determined, ***and***
* specify or recite that VA is to pay the agent or attorney directly out of past due benefits

When a fee agreement is received at the Regional Office (RO) the AAFC will determine whether * the agreement satisfies the requirements 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).
* only one individual accredited agent or attorney has signed the direct-pay fee agreement, and
* the accredited agent or attorney who signed the fee agreement also signed the [*VA Form 21-22a*](http://www.vba.va.gov/pubs/forms/VBA-21-22A-ARE.pdf), and
* the agreement was filed with the RO within 30 days of its execution.

***Important***: The AAFC must evaluate available documentation to determine whether a request for direct payment of fees has been submitted.* In the eFolder review documents in the category REPRESENTATION – PRIVATE ATTORNEY/ATTORNEY FEE AGREEMENT.
* Where there is a paper claims folder evaluate the documents on the right hand flap of the folder.

***Notes***: * If the fee agreement is signed by more than one accredited agent or attorney, signed by an individual who did not sign the [*VA Form 21-22a*](http://www.vba.va.gov/pubs/forms/VBA-21-22A-ARE.pdf), or is otherwise not in compliance with [38 CFR 14.636](http://www.ecfr.gov/cgi-bin/text-idx?SID=7c8f90d08160838eff7394bf01103d9e&mc=true&node=se38.1.14_1636&rgn=div8), return it to the agent or attorney, with a letter
* advising him/her the fee agreement is not acceptable because it does not comply with [38 CFR 14.636](http://www.ecfr.gov/cgi-bin/text-idx?SID=7c8f90d08160838eff7394bf01103d9e&mc=true&node=se38.1.14_1636&rgn=div8), and
* explaining how it does not comply.
* The term ***execution***, as used in [38 CFR 14.636(g) and (h)(4)](http://www.ecfr.gov/cgi-bin/text-idx?SID=7c8f90d08160838eff7394bf01103d9e&mc=true&node=se38.1.14_1636&rgn=div8), means the act of signing.
* VA applies the postmark rule of [38 CFR 20.305](http://www.ecfr.gov/cgi-bin/text-idx?SID=f0eaed86d103c63f66066edc1bd4e54d&mc=true&node=se38.2.20_1305&rgn=div8) to determine when the fee agreement is received.
* If the direct-pay fee agreement is filed at the RO beyond 30 days of its execution (compute the time period per [38 CFR 3.110](http://www.ecfr.gov/cgi-bin/text-idx?SID=f0eaed86d103c63f66066edc1bd4e54d&mc=true&node=se38.1.3_1110&rgn=div8)), return it to the representative, with a letter explaining that it does not comply with the direct-pay fee agreement filing requirements of [38 CFR 14.636(h)(4)](http://www.ecfr.gov/cgi-bin/text-idx?SID=7c8f90d08160838eff7394bf01103d9e&mc=true&node=se38.1.14_1636&rgn=div8).
* As provided by M21-1, Part I, 3.A.5.a, VA does not honor requests for exclusive contact with a representative.
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| g. Determining Whether Direct Payment of Fees Is at Issue | Direct payment of fees is at issue when * A valid fee agreement has been timely received 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) and M21-1, Part I, 3.C.1.f, and
* the fee agreement can be honored by VA as provided in [38 CFR 14.636(h)(1)](http://www.ecfr.gov/cgi-bin/text-idx?SID=7c8f90d08160838eff7394bf01103d9e&mc=true&node=se38.1.14_1636&rgn=div8) and this block.

The table below provides guidance on how to proceed depending on whether or not direct payment of fees is at issue. |

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| If ... | Then ... |
| direct payment of fees is at issue | follow the process for determining whether to pay fees from past due benefits as provided in M21-1, Part I.3.C.2. |
| direct payment of fees is *not* at issue | a decision regarding eligibility for direct payment of fees, or attorney/agent fee is not required; process the claimant’s award. |

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| As provided in [38 CFR 14.636(h)(1)](http://www.ecfr.gov/cgi-bin/text-idx?SID=7c8f90d08160838eff7394bf01103d9e&mc=true&node=se38.1.14_1636&rgn=div8)) 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.
* In [*Hanlin v. Nicholson*](http://vbaw.vba.va.gov/bl/21/advisory/CAVCDAD.htm#bmh), 474 F.3d 1355 (Fed. Cir. 2007), the United States Court of Appeals for the Federal Circuit determined that one claimant cannot bind another claimant to an attorney fee agreement.

***References***: For more information on * circumstances in which attorneys and agents may seek reimbursement from claimants for expenses related to representation, see [38 CFR 14.637](http://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=02d2aa2ad3fb6c40d6063360e6297c36&mc=true&r=SECTION&n=se38.1.14_1637), and
* who must be parties to a fee agreement in order for fees to be payable from a specific award of benefits, see
* [VAOPGCPREC 5-96](http://www.va.gov/ogc/docs/1996/Prc05-96.doc) and
* Who must sign a fee agreement for the attorney or agent to be considered hired or retained, see M21-1, Part I, 3.C.4.k.
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#### 2. Process for Paying Fees Directly From Past Due Benefits

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| Introduction | This topic contains information of the process of paying fees directly from past due benefits including* the direct fee payment process, and
* direct payment of fees when appointment of a fiduciary is pending
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| a. The Direct Fee Payment Process  | The table below describes the process for paying attorney/agent fees directly from past-due benefits. ***Note***: The following actions should take place at approximately the same time:* withholding past-due benefits to be paid as fees
* authorizing the award and providing notice of the rating decision, and
* making and providing notice of the direct-pay fee eligibility decision.
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| Stage | Who Is Responsible | Description | Reference |
| 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.  | * [38 CFR 14.636(g) and (h)](http://www.ecfr.gov/cgi-bin/text-idx?SID=7c8f90d08160838eff7394bf01103d9e&mc=true&node=se38.1.14_1636&rgn=div8)
* M21-1, Part I, 3.C.4.g.
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| 2 | Veterans Service Representative (VSR) | Under review of the AAFC, prepares the claimant’s award, leaving it in a pending status. | M21-1, Part I, 3.C.3.f  |
| 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.
 | M21-1, Part I, 3.C.3. |
| 4 | AAFC | Requests the RO’s finance activity to establish a withholding of the amount payable. | M21-1, Part I, 3.C.3.f. |
| 5 | Finance Activity | Establishes the withholding. | M21-1, Part I, 3.C.3.f and g. |
| 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.
 | M21-1, Part I, 3.C.3.g. |
| 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.
 | M21-1, Part 1, 3.C.4. |
| 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.  | M21-1, Part I, 3.C.5. |
| 9 | Finance Activity | Releases funds. | See M21-1, Part I, 3.C.5. |

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| b. Direct Payment of Fees When Appointment of a Fiduciary is Pending | The table below describes the process for direct payment of attorney/agent fees out of past-due benefits awarded to an incompetent claimant when appointment of a fiduciary is pending.  |

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| Stage | Description |
| 1 | * After the award of past due benefits to an incompetent claimant has been promulgated but before the award is authorized the AAFC will
* compute the amount of past-due benefits to be withheld for fees in the event eligibility to fees is established, and
* create and provide a signed Memorandum to the RO’ requesting an 18 transaction in Finance and Accounting System (FAS), to establish the 63C Offset withholding the calculated amount of attorney or agent fees from total past due amounts in accordance with the fee agreement (see M21-1, Part I, 3.C.3).
* Once the withholding transaction has been processed and approved by the RO Finance Officer or designee, the financial activity will
* notify the AAFC, and
* provide the AAFC with the signed FAS authorization sheet (18 transaction), to be placed in the claims folder.
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| 2 | The AAFC makes a direct-pay fee eligibility decision and sends it to the claimant and the attorney or agent as provided in M21-1, Part I, 3.C.4. |
| 3 | * Once the fee-appeal period (60 days) has expired, and no appeal has been filed, the AAFC will create and provide a signed Memorandum to the finance activity requesting the disbursement of attorney fees (now in Fund 6279 from the 63C Offset), to the attorney/agent and collection of the assessment fee as applicable
* The finance activity will process the request to disburse the attorney/agent fee and collect the attorney assessment (when required) as provided in M21-1, Part I, 3.C.5.
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| ***Important***: * *Do not* hold attorney/agent fees approved under the eligibility decision until a fiduciary is appointed, as this could result in considerable delay of payment to the attorney/agent.
* The memoranda referred to in the table above are evidentiary and must be included in the claims folder.
* Authorization and payment of the remaining past due amount (not withheld for direct fee payment) in a case of an incompetent claimant must follow the guidance in M21-1, Part III, Subpart v, 9.B.2.

***References***: For more information on * general authorization information on incompetency and fiduciary cases, see M21-1, Part III, Subpart v, 9.A, and
* paying attorney/agent fees when appointment of a fiduciary is pending, see [*Freeman v. Shinseki*](http://vbaw.vba.va.gov/bl/21/advisory/CAVCDAD.htm#bmf), 24 Vet.App. 404 (2011).
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#### 3. Withholding From Claimant’s Past-Due Benefits and Authorizing the Claimant’s Award

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| Introduction | This topic contains information on withholding a portion of the claimant’s past-due benefits for fees and authorizing the claimant’s award, including* when to withhold, make a fee eligibility decision, and send notice
* when not to withhold for possible payment of fees
* the period to use for calculating past- due benefits
* amount used for calculation of past due benefits – reduction or offset cases
* making a direct-pay fee decision based on past due benefit calculation
* withholding via VBMS Awards
* authorizing the award, and
* handling cases involving Equal Access to Justice Act (EAJA) fees.
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| a. When to Withhold, Make a Fee Eligibility Decision, and Send Notice | See the table below for guidance on when to withhold a portion of past due benefits for possible payment of fees and then proceed to making an attorney fee or agent fee eligibility decision and sending notification as provided in M21-1, Part I, 3.C.4. |

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| When... | Then ... |
| * there is a valid direct-pay fee agreement filed with the AOJ (VSC or PMC), ***and***
* VA awards past-due benefits.
 | before the claimant’s award is authorized, the AAFC must * withhold 20 percent (or less, in accordance with the fee agreement) of the past-due benefits through and including the date of the rating decision, and
* proceed to make an attorney or agent fee eligibility decision and send notification to both the claimant and the attorney or agent as provided in M21-1, Part I, 3.C.4.
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| ***Important***: This withholding policy applies* even if the attorney or agent is no longer the POA, unless the attorney or agent has waived any entitlement to fees in writing (including but not necessarily limited to submissions by mail, fax, or e-mail), and
* each time the amount of past due benefits arising from a particular rating decision changes, including
* when dependency information is received within 1 year of the date of the rating decision, or
* when the Veteran is subsequently found eligible for concurrent receipt of military retired pay for any time during the past due benefits period.

***Note***: This policy does not relate to whether to *award or deny* direct payment of fees. ***References***: For * information on what constitutes a valid fee agreement, see
* [38 CFR 14.636(g)(1) and (2)](http://www.ecfr.gov/cgi-bin/text-idx?SID=7c8f90d08160838eff7394bf01103d9e&mc=true&node=se38.1.14_1636&rgn=div8), and
* M21-1, Part I, 3.C.1.f
* information on the AOJ’s obligation to make a decision regarding eligibility for direct payment of fees, see *Cox v. West*, 149 F.3d 1360 (Fed. Cir. 1998).
* information on an attorney or agent’s entitlement to direct payment of fees where the award is made after the attorney or agent no longer represents the claimant, see Scates v. Principi, 282 F.3d 1362 (Fed. Cir. 2002); [*Lippman v. Shinseki*](http://www.uscourts.cavc.gov/documents/Lippman2-1617.pdf), 23 Vet. App. 243 (2009).
* a definition of “past-due benefits,” see [38 CFR 14.636(h)(3)](http://www.ecfr.gov/cgi-bin/text-idx?SID=7c8f90d08160838eff7394bf01103d9e&mc=true&node=se38.1.14_1636&rgn=div8).
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| b. When Not to Withhold for Possible Payment of Fees | The AAFC is not to withhold 20 percent or less of past-due benefits if* there is no direct-pay fee agreement filed at the AOJ
* a direct-pay fee agreement was filed at the AOJ, but no NOD has ever been filed in the case because the claim is an original claim, or
* the agent or attorney has withdrawn the direct-pay fee agreement.

***Note***: If the AOJ does not withhold a portion of the claimant’s past due benefits for fees, but the attorney or agent asserts that withholding was required, a decision is necessary. Use the decision notice, *Summary of Case Fee Decision Notice*, using the [Letter Creator](http://vbacodmoint1.vba.va.gov/bl/21/LetterGenerator/LG.asp) on the [Rating Job Aids](http://vbaw.vba.va.gov/bl/21/rating/rat00.htm) page of the Compensation Service website. |

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| c. The Period to Use for Calculating Past- Due Benefits | Past-due benefits are calculated * *from* the effective date of the award
* *to* the *date* of the decision awarding benefits,
* not the date of the notification letter
* not the last day of the month in which the decision awarding benefits was made. See [VAOPGCPREC 18-95](http://www.va.gov/ogc/docs/1995/Prc18-95.doc) and [38 CFR 14.636(h)(3)](http://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=9bfb0970cef51faf8145917a4622297d&mc=true&r=SECTION&n=se38.1.14_1636) regarding definition of past due benefits
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| d. Amount Used for Calculation of Past Due Benefits – Reduction or Offset Cases | 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. |

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| 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*](http://www.cafc.uscourts.gov/images/stories/opinions-orders/06-7239.pdf)*,* 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. |

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| ***Important***: * In cases where the Veteran was in receipt of retired pay, and there is not past due benefit, the attorney cannot be paid.
* 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.
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| e. Making a Direct-Pay Fee Decision Based on Past Due Benefit Calculation | The table below provides guidance on making a decision on direct payment of fees based on the past due benefit amount calculation derived from M21-1, Part I, 3.C.3.c. |

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| If, based on the calculation described above, the amount of past due benefits... | Then ... |
| is $0 | * deny direct payment of fees
* send the decision notice *No Cash Payment* *to the Claiman*t shown in M21-1, Part I, 3.C.11, Exhibit 4, to both the claimant and the attorney, separately addressed to each, and
* take a 290 end product (EP) credit.
 |
| is greater than $0 | withhold a portion of past-due benefits and authorize the claimant’s award as provided in this topic. |

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| f. Withholding via VBMS Awards | Follow the steps in the table below to withhold a portion of the past-due benefits via VBMS Awards regardless of whether a running award exists. |

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| Step | Action |
| 1 | Generate the award and leave in “pending status.” |
| 2 | Print a copy of the award. |
| 3 | Send the entire folder to the finance activity with a copy of the award and a memorandum signed by the AAFC containing 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]**.” |
| 4 | Authorize the award per M21-1, Part I, 3.C.3.g, after the finance activity has established the 18 transaction in the corporate record. |

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| g. Authorizing the Award | Follow the steps in the table below to authorize the award once a portion of the past-due benefits has been withheld for possible payment of attorney or agent fees. |

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| Step | Action |
| 1 | When the 31J deduction or 18 transaction appears in the corporate record, compare the amount in the corporate record with the amount specified in the AAFC’s memorandum. |
| 2 | Is the amount in the corporate record the same as on the memorandum?* If *yes,* go to Step 3.
* If *no*, contact the finance activity to learn why the discrepancy exists.
 |
| 3 | Authorize the award.***Note***: No FISA action is necessary.  |

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| ***Important***: In any case involving direct payment of attorney/agent fees from past due amounts awarded to an incompetent claimants pending appointment of a fiduciary see M21-1, Part I.3.C.2.b. Authorization of the remaining balance of past due amounts after fees are withheld is addressed by M21-1, Part III, Subpart v, 9.B.2.  |

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| h. Handling Cases Involving EAJA Fees | VA is not authorized to offset Equal Access to Justice Act (EAJA) fees from the 20 percent withheld for attorney fees. EAJA fees are payments that a court has ordered VA to pay for an attorney. They may appear on the Veteran’s electronic record as a payment made jointly to the claimant and the attorney but should never be offset from a direct payment of fees, even when VA fails to withhold fees. ***Reference***: For more information on failure to withhold past-due benefits, see* M21-1, Part I, 3.C.7, and
* [VAOPGCPREC 12-97](http://www.va.gov/ogc/docs/1997/Prc12-97.doc).
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#### 4. Making an Attorney or Agent Fee Eligibility Decision and Sending Notification

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| Introduction | This topic contains information on making an attorney or agent fee eligibility decision and sending notification, including * determining what constitutes a “case”
* example 1 – what constitutes a “case”
* example 2 – what constitutes a “case”
* example 3 – what constitutes a “case”
* example 4 – what constitutes a “case”
* example 5 – what constitutes a “case”
* example 6 – what constitutes a “case”
* example 7 – what constitutes a “case”
* example 8 – what constitutes a “case”
* relationship between NOD and fee eligibility decision and notice
* NOD received on or before June 19, 2007 – final decision and retention criteria
* NOD received on or before June 19, 2007 – making the decision
* NOD received on or after June 20, 2007 – representation criteria
* NOD received on or after June 20, 2007 – making the decision, and
* discussing attorney or agent assessments in the decision
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| a. Determining What Constitutes a Case | VA accredited attorneys and agents may only charge fees for services provided after the RO has issued a decision and a NOD has been filed with respect to a “case.” When making a determination on fees apply the following principles:* 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.

Examples in following blocks illustrate what constitutes a “case” for the purpose of determining whether fees may be charged.***References***: For more information on* The case concept, see [*In the Matter of the Fee Agreement of James W. Stanley, Jr.*](http://vbaw.vba.va.gov/bl/21/advisory/CAVCDAD.htm#bms)*,* 10 Vet.App. 104 (1997) (docket no. 96-0017)
* Distinct symptomatology, see [*Esteban v. Brown*](http://vbaw.vba.va.gov/bl/21/advisory/CAVCDAD.htm#bme), 6 Vet. App. 259 (1994),
* Different diagnoses assigned to the same symptoms, see [*Clemons v. Shinseki*](http://vbaw.vba.va.gov/bl/21/advisory/CAVCDAD.htm#bmc), 23 Vet. App. 1 (2009).
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| b. Example 1 – What Constitutes a “Case” | ***Facts**** The Veteran seeks service connection for (1) posttraumatic stress disorder (PTSD) and (2) hearing loss.
* The RO denies service connection for PTSD and defers the issue of service connection for hearing loss.
* After the Veteran files an NOD with the denial of service connection for PTSD, the RO awards service connection for hearing loss.

***Result***The Veteran’s request for service connection for PTSD and the request for service connection for hearing loss constitute separate cases because they involve distinct disabilities. Fees may not be paid based on the award of service connection for hearing loss because the award was made in the initial decision, before an NOD could have been filed. |

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| c. Example 2 – What Constitutes a “Case” | ***Facts**** 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 service connection for depression and the Veteran filed an NOD.
* On appeal, a Decision Review Officer (DRO) awards service connection for PTSD effective August 4, 2008.

***Result***Assuming the POA and fee agreement requirements are met, fees may be paid based on the award of service connection. The effective date of the award indicates that the award of service connection was granted based on the claim that was initially characterized as “depression.” A new case was not created merely because VA began describing the same symptoms by a different name. |

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| d. Example 3 – What Constitutes a “Case” | ***Facts**** On August 4, 2008, the Veteran files a claim for service connection for depression. The RO denied service connection for depression and the Veteran filed an NOD.
* While the appeal is pending, the Veteran submits evidence indicating that he has been unemployable due to depression since 2006.
* On appeal, a DRO awards service connection for depression with a 70 percent rating and total disability based on individual unemployability (IU) effective August 4, 2008.

***Result***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. |

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| e. Example 4 – What Constitutes a “Case” | ***Facts**** On August 4, 2008, the Veteran files a claim for service connection for depression and the RO grants service connection for depression with a 30 percent rating effective date of claim. The Veteran files an NOD with the initial rating.
* On January 2, 2010, while the appeal regarding the initial rating for depression is pending, the Veteran files a claim for service connection for a knee condition. At the same time, the Veteran submits evidence indicating that his knee condition renders him unemployable.
* The RO grants service connection for the knee condition with a 50 percent initial rating effective January 2, 2010, resulting in a combined rating of 70 percent.
* In light of that combined rating, the RO is also able to award schedular IU effective January 2, 2010.

***Result***Fees may not be paid. The claim for depression was separate from the claim for the knee condition. IU was part of the claim for the knee condition. No NOD had been filed regarding the knee condition. [*Jackson v. Shinseki*](http://cafc.uscourts.gov/images/stories/opinions-orders/09-7015.pdf), 587 F.3d 1106 (Fed. Cir. 2009). |

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| f. Example 5 – What Constitutes a “Case” | ***Facts**** The Veteran files a claim for service connection for a heart condition. The RO denies service connection for the heart condition and the Veteran files an NOD.
* While the appeal is pending, the Veteran dies and the Veteran’s surviving spouse is substituted.
* A DRO grants service connection for the Veteran’s heart condition and accrued benefits are paid to the surviving spouse.

***Result***Assuming the POA and fee agreement requirements are met, fees may be paid based on the award of accrued benefits. For fee purposes, the substitution claimant seeking accrued benefits is considered to be continuing the “case” that was pending when the Veteran died. |

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| g. Example 6 – What Constitutes a “Case” | ***Facts**** The Veteran, who is already service-connected for a heart condition, files a claim for service connection for a knee condition. The RO denies service connection for the knee condition and the Veteran files an NOD.
* While the appeal is pending, the Veteran dies of the service-connected heart condition.
* The Veteran’s surviving spouse is substituted in the Veteran’s appeal of the knee condition, but the appeal is ultimately denied.
* The Veteran’s surviving spouse applies for and is awarded DIC for the Veteran’s death.

***Result***Fees may not be paid. The only claim pending at the time of the Veteran’s death was for the knee condition and VA did not pay benefits for the knee condition. The Veteran did not have a claim pending for the heart condition. The surviving spouse’s DIC claim was a separate claim for which no NOD was ever filed.  |

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| h. Example 7 – What Constitutes a “Case” | ***Facts**** In June 2007, the Veteran files a claim for service connection for a knee condition. In 2008, the RO denies service connection for the knee condition and the Veteran does not file an NOD.
* In 2011, the Veteran challenges the 2008 RO decision on the grounds of CUE.
* The RO finds no CUE in the 2008 decision and the Veteran files an NOD.
* On appeal, the Board of Veterans Appeals (BVA) concludes that there was CUE in the 2008 RO decision and awards service connection effective June 2007.

***Result***Fees may be paid. The NOD with the RO’s decision finding no CUE satisfies the requirement. ***Important*:** This requirement is only met if the NOD was filed on or after June 20, 2007. |

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| i. Example 8 – What Constitutes a “Case” | ***Facts**** In June 2007, the Veteran files a claim for service connection for a knee condition. In 2008, the RO denies service connection for the knee condition. The Veteran does file an NOD and the RO issues an SOC, but the Veteran does not file a timely substantive appeal, rendering the underlying decision final.
* In 2013, after the time to file the substantive appeal has passed, the Veteran challenges the 2008 RO decision on the grounds of CUE.
* The RO finds CUE in the 2008 decision and awards service connection effective June 2007.

***Result***Fees may be paid. The NOD with the 2008 decision denying service connection satisfies the requirement. CUE is not a separate case from the underlying decision being challenged. *See* [*Carpenter v. Nicholson*](http://cafc.uscourts.gov/images/stories/opinions-orders/05-7066.pdf), 452 F.3d 1379, (Fed. Cir. 2006). ***Important*:** This requirement is only met if the NOD was filed on or after June 20, 2007. |

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| j. Relationship Between NOD and Fee Eligibility Decision and Notice | The following table provides guidance on further action to take on a qualifying case based on whether a NOD has been received, and in cases where there has been a NOD, when the NOD was filed.  |

|  |  |
| --- | --- |
| If ... | Then ... |
| no NOD was filed in the case | * deny direct payment of fees
* generate the decision notice, *Summary of Case Fee Decision Notice*, using the [Letter Creator](http://vbacodmoint1.vba.va.gov/bl/21/LetterGenerator/LG.asp) on the [Rating Job Aids](http://vbaw.vba.va.gov/bl/21/rating/rat00.htm) page of the Compensation Service website
* separately send the decision notice to the claimant and the attorney, and
* take a 290 EP credit.
 |
| an NOD was filed in the case on or before June 19, 2007 | Consider additional eligibility criteria in M21-1, Part I, 3.C.4.k.-l. |
| an NOD was filed in the case on or after June 20, 2007 | Consider additional eligibility criteria in M21-1, Part I, 3.C.4.m. |

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| k.  NOD Received on or Before June 19, 2007 –Final Decision and Retention Criteria | Per [38 CFR 14.636(c)(2)](http://www.ecfr.gov/cgi-bin/text-idx?SID=7c8f90d08160838eff7394bf01103d9e&mc=true&node=se38.1.14_1636&rgn=div8), where the NOD in the case was received on or before June 19, 2007, an accredited attorney or agent is eligible to receive fees from past-due benefits only if the following two eligibility conditions are also met:* the appeal initiated by the NOD resulted in a final BVA decision on the issue involved, and
* the attorney or agent was retained no later than one year after the date BVA promulgated its decision, and prior to the date of the decision granting the award of benefits from which fees are to be paid. See [*Cameron v. Shinseki*](http://cafc.uscourts.gov/images/stories/opinions-orders/12-7125.opinion.7-2-2013.1.pdf), 721 F.3d 1365 (2013).

***Important***:* On the first prong (a final BVA decision)
* BVA remands are generally not considered final decisions. [38 CFR 20.1100](http://www.ecfr.gov/cgi-bin/text-idx?SID=7ea76ae889c0731ab10d120ed98b39dc&mc=true&node=se38.2.20_11100&rgn=div8). The Federal Circuit concluded in [*Stanley v. Principi*](http://vbaw.vba.va.gov/bl/21/advisory/CAVCDAD.htm#bms), 283 F.3d 1350 (Fed.Cir. 2002) that in original proceedings there can be no entitlement to attorneys' fees until an appealable decision has been rendered.
* However, if pursuant to a request to reopen a claim BVA reopens the claim and remands it to the AOJ for a decision on the merits, the BVA remand would meet the regulatory criteria of a final decision for the purpose of direct payment of fees (see [*Stanley v. Principi*](http://vbaw.vba.va.gov/bl/21/advisory/CAVCDAD.htm#bms), 283 F.3d 1350 (Fed. Cir. 2002).
* On the second prong (attorney retention)
* The attorney or agent may be hired before the first BVA decision (as long as a valid declaration of representation remained in effect for that attorney at the time the first BVA decision is made), but must be hired no later than one year after the final BVA decision.
* The attorney or agent is considered hired once both the Veteran and the attorney or agent have signed the fee agreement. See [*Mason v. Shinseki*](http://www.uscourts.cavc.gov/documents/Mason_08-2969_published_opinion_October_28.pdf), 25 Vet. App. 83 (2011).
* The one-year limitation
* is met with respect to all successor attorneys acting in the continuous prosecution of the same matter if a predecessor was retained within the required time period, and
* is met if there is a subsequent VA decision in the same case *and* the attorney or agent is hired no more than one year after that decision becomes final, see [*Stanley v. Principi*](http://vbaw.vba.va.gov/bl/21/advisory/CAVCDAD.htm#bms), 283 F.3d 1350 (Fed. Cir. 2002); and
* does *not* apply if the attorney was hired when the case was before a court.
* Attorneys need not have been accredited under the current requirements in [38 CFR 14.626-14.637](http://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=02d2aa2ad3fb6c40d6063360e6297c36&mc=true&n=pt38.1.14&r=PART&ty=HTML#sg38.1.14_1619.sg6) if representation valid under the prior law was initiated, and the claim was filed, before the effective date of those regulations, June 23, 2008.

***Reference***: For guidance on referral for reasonableness review in cases involving multiple eligible attorneys or agents, see M21-1, Part I, 3.C.6.h. |

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| l. NOD Received on or Before June 19, 2007 – Making the Fee Decision  | The table below includes guidance on making a decision and taking related actions on direct payment of fees in cases where the NOD was received on or before June 19, 2007.  |

|  |  |
| --- | --- |
| If ... | Then ... |
| one or both of the criteria listed above in M21-1, Part I, 3.C.4.k are *not* met (there was not a final BVA decision and/or there was not qualifying attorney retention) | * deny direct payment of fees
* generate the decision notice, *Summary of Case Fee Decision Notice*, using the [Letter Creator](http://vbacodmoint1.vba.va.gov/bl/21/LetterGenerator/LG.asp) on the [Rating Job Aids](http://vbaw.vba.va.gov/bl/21/rating/rat00.htm) page of the Compensation Service website
* separately send the decision notice to the claimant and the attorney, and
* take a 290 EP credit.
 |
| * all of the requirements described above in M21-1, Part I, 3.C.3.l *are* met, and
* a portion of the claimant’s past due benefits have been withheld for payment of fees
 | * award direct payment of fees
* generate the decision notice, *Summary of Case Fee Decision Notice*, using the [Letter Creator](http://vbacodmoint1.vba.va.gov/bl/21/LetterGenerator/LG.asp) on the [Rating Job Aids](http://vbaw.vba.va.gov/bl/21/rating/rat00.htm) page of the Compensation Service website
* separately send the decision notice to the claimant and the attorney, and
* take a 290 EP credit.
 |
| * all of the requirements described above *are* met, and
* all of the past due benefits were released to the claimant without a portion being withheld for payment of fees
 | * award direct payment of fees
* generate the decision notice, *Summary of Case Fee Decision Notice*, using the [Letter Creator](http://vbacodmoint1.vba.va.gov/bl/21/LetterGenerator/LG.asp) on the [Rating Job Aids](http://vbaw.vba.va.gov/bl/21/rating/rat00.htm) page of the Compensation Service website
* separately send the decision notice to the claimant and the attorney, and
* generate the due process notice *Debt to Veteran for Failure to Withhold Attorney Fee Letter*, using the [Letter Creator](http://vbacodmoint1.vba.va.gov/bl/21/LetterGenerator/LG.asp) on the [Rating Job Aids](http://vbaw.vba.va.gov/bl/21/rating/rat00.htm) page of the Compensation Service website
* Send the due process notice only to the claimant and representative, if any, **at the same time** as the fee eligibility is sent to the claimant and the attorney or agent, and
* after the due process period expires, send the claimant the final notice, *Fee Recoupment Procedures – Final Notice,* shown in M21-1, Part I, 3.C.13, Exhibit 6, and
* take a 290 EP credit.

***Note***: The due process notice advises the claimant that VA * has found the attorney or agent entitled to fees, and
* will be creating a debt against the claimant’s account at the same time that VA pays the attorney or agent.
 |

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| ***Note***: In any case where more than one attorney or agent is eligible for payment of fees, * send the decision notice *Direct-Pay Fee Decision Notice – Direct-Pay Fee Agreement Filed by More Than One Attorney/Agent* in M21-1, Part I, 3.C.12, Exhibit 5 to each attorney/agent and the claimant along with appeal rights, and
* refer to M21-1, Part I, 3.C.6.d and f on reasonableness reviews based on eligibility of multiple attorney s/agents.
 |

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| m. NOD Received on or After June 20, 2007 –Representation Criteria | Per [38 CFR 14.636(c)](http://www.ecfr.gov/cgi-bin/text-idx?SID=9bfb0970cef51faf8145917a4622297d&mc=true&node=se38.1.14_1636&rgn=div8), fees may only be charged for representation provided after an NOD has been filed and there is a fee agreement between the claimant and the attorney or agent. Further, per [38 CFR 14.631(a)](http://www.ecfr.gov/cgi-bin/text-idx?SID=afc54df0c9fb0836ebffea08507fc6b2&mc=true&node=se38.1.14_1631&rgn=div8), a claimant must authorize an attorney or agent to represent them.* For representation initiated *on or after June 23, 2008*, this requires a [*VA Form 21-22a*](http://www.vba.va.gov/pubs/forms/VBA-21-22A-ARE.pdf) signed by both the claimant and the attorney or agent.
* For representation *initiated before June 23, 2008*, the [*VA Form 21-22a*](http://www.vba.va.gov/pubs/forms/VBA-21-22A-ARE.pdf) signed by both the claimant and the attorney or agent was used for this purpose. In the alternative, an attorney could submit a statement, on his or her letterhead stating that he or she is authorized to represent the claimant.

Together, [38 CFR 14.631(a)](http://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=9bfb0970cef51faf8145917a4622297d&mc=true&r=SECTION&n=se38.1.14_1631) and [38 CFR 14.636(c)](http://www.ecfr.gov/cgi-bin/text-idx?SID=9bfb0970cef51faf8145917a4622297d&mc=true&node=se38.1.14_1636&rgn=div8) require that, for fees to be payable, there must have been a valid declaration of representation between the claimant and the attorney or agent in effect (that is, having been received by VA and not having been subsequently revoked) at some point between the date of the NOD and the date of the decision awarding benefits (not the notification letter). * As long as the valid declaration of representation was in effect at some time between the date when the first NOD was filed with respect to the claim and the time VA made the last decision on the same claim, this requirement is met. See [*Lippman v. Shinseki*](http://www.uscourts.cavc.gov/documents/Lippman2-1617.pdf), 23 Vet. App. 243 (2009).

The table below provides guidance on for whom the representation must have been provided, in order for fees to be payable: |

|  |  |
| --- | --- |
| *If* the benefit awarded is...  | *Then* there must be a declaration of representation and a fee agreement between the attorney or agent and the... |
| Compensation (including dependency allowances) | Veteran |
| Pension (including dependency allowances) | Veteran |
| Dependency and Indemnity Compensation / Death Pension (including dependency allowances) | Survivor |
| Accrued Benefits | Survivor (This requirement applies even if there has been substitution.) |
| Apportionments | Apportionee |

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| ***Reference***: For guidance on referral for reasonableness review in cases involving multiple eligible attorneys or agents, see M21-1, Part I, 3.C.6.d. |

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| **n. NOD received on or after June 20, 2007 – Making the Decision** | The table below provides guidance on making a decision on entitlement to direct payment of attorney fees in a case where the NOD was received on or after June 20, 2007. |

|  |  |
| --- | --- |
| If ... | Then ... |
| one or more of the representation requirements described above are not met | * deny direct payment of fees
* send the decision notice in
* M21-1, Part I, 3.C.8, Exhibit 1, *Decision Notice No Valid POA*, or (as applicable)
* M21-1, Part I, 3.C.9, Exhibit 2, *Decision Notice – No Fee Agreement and/or Valid POA* (Survivor)
* separately send the decision notice to the claimant and the attorney,***and***
* take a 290 EP credit.
 |
| * all of the requirements described above are met, ***and***
* a portion of the claimant’s past due benefits have been withheld for payment of fees
 | * award direct payment of fees
* generate the decision notice, *Summary of Case Fee Decision Notice*, using the [Letter Creator](http://vbacodmoint1.vba.va.gov/bl/21/LetterGenerator/LG.asp) on the [Rating Job Aids](http://vbaw.vba.va.gov/bl/21/rating/rat00.htm) page of the Compensation Service website
* separately send the decision notice to the claimant and the attorney, ***and***

take a 290 EP credit. |
| * all of the requirements described above are met, ***and***
* all of the past due benefits were released to the claimant without a portion being withheld for payment of fees
 | * award direct payment of fees
* generate the decision notice, *Summary of Case Fee Decision Notice*, using the [Letter Creator](http://vbacodmoint1.vba.va.gov/bl/21/LetterGenerator/LG.asp) on the [Rating Job Aids](http://vbaw.vba.va.gov/bl/21/rating/rat00.htm) page of the Compensation Service website
* separately send the decision notice to the claimant and the attorney, and
* generate the due process notice *Debt to Veteran for Failure to Withhold Attorney Fee Letter*, using the [Letter Creator](http://vbacodmoint1.vba.va.gov/bl/21/LetterGenerator/LG.asp) on the [Rating Job Aids](http://vbaw.vba.va.gov/bl/21/rating/rat00.htm) page of the Compensation Service website
* Send the due process notice only to the claimant and representative, if any, **at the same time** as the fee eligibility is sent to the claimant and the attorney or agent, and
* after the due process period expires, send the claimant the final notice, *Fee Recoupment Procedures – Final Notice,* shown in M21-1, Part I, 3.C.13, Exhibit 6, and
* take a 290 EP credit.

***Note***: The due process notice advises the claimant that VA * has found the attorney or agent entitled to fees, and

will be creating a debt against the claimant’s account at the same time that VA pays the attorney or agent. |

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| ***Note***: In any case where more than one attorney or agent is eligible for payment of fees, * send the decision notice *Direct-Pay Fee Decision Notice – Direct-Pay Fee Agreement Filed by More Than One Attorney/Agent* in M21-1, Part I, 3.C.12, Exhibit 5 to each attorney/agent and the claimant along with appeal rights, and
* refer to M21-1, Part I, 3.C.6.d and f on reasonableness reviews based on eligibility of multiple attorney s/agents.

***Reference***: For more information on * calculation of attorney or agent assessments in cases involving a NOD received on or after June 20, 2007, see M21-1, Part I, 3.C.4.o, and
* releasing fees where an assessment is payable, see M21-1, Part I, 3.C.5.f.
 |

|  |  |
| --- | --- |
| o. Attorney or Agent Assessments | For cases where the NOD was received on or after June 20, 2007 VA will charge and collect an assessment out of the fees paid directly to attorneys and agents out of past due benefits awarded. See [38 CFR 14.636(h)](http://www.ecfr.gov/cgi-bin/text-idx?SID=9bfb0970cef51faf8145917a4622297d&mc=true&node=se38.1.14_1636&rgn=div8). The actual collection of the assessment amount does not occur until amounts withheld for fees are released and this in turn is dependent on whether there is an appeal on the fee eligibility decision as provided in M21-1, Part I, 3.5. However the AAFC must calculate the assessment at the time the fee decision is made. Information on the assessment must be included in the decision notice. Moreover the attorney or agent could potentially appeal the assessment or amount thereof.The amount of the assessment is 5 percent of the past due benefit payment, up to $100, each time fees are paid.  |

#### 5. Releasing Funds Withheld for Fees and Appeals of Eligibility Determinations

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| Introduction | This topic contains information on releasing funds and appeals of eligibility determinations, including* fee eligibility appeals
* who handles appeals of fee eligibility
* prohibitions on releasing funds and appeal rights
* releasing withheld funds
* in appealed fee decisions
* when the fee decision is not appealed
* when an assessment is required, and
* when an assessment is not required
* taking action if the claimant dies before the decision is promulgated
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| Change Date |  July 31, 2015 |

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| a. Fee Eligibility Appeals | A claimant may initiate an appeal from the RO eligibility determination that fees are payable from withheld past due benefits by submitting a NOD stating the bases for the appeal. These may include that:* a NOD was not filed on the case for which a fee is being sought
* the claimant did not sign a VA form 21-22a authorizing representation from the attorney or agent seeking a fee, or
* the claimant did not sign a written agreement to pay an attorney/agent fee from past due benefits

***Important***: Appeals from fee eligibility decisions are considered contested. Therefore the attorney or agent and the claimant have* 60 days to file an NOD after the date of the decision notice accompanying the fee eligibility decision, and
* 30 days to file a substantive appeal after the date of the statement of the case.

***References***: For * more information on
* contested claims and appeals, see
* M21-1, Part III, Subpart vi, 6, and
* [38 U.S.C. 7105A](http://www.law.cornell.edu/uscode/html/uscode38/usc_sec_38_00007105---A000-.html)
* reasonableness reviews, see M21-1, Part I, 3.C.6.
* NODs, see M21-1, Part I, 5.B, and
* substantive appeals, see M21-1, Part I, 5.E
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| b. Who Handles Appeals of Fee Eligibility  | Appeals of direct-pay fee decisions are to be filed with the Regional Office. They are handled as traditional appeals by RO AAFCs or VSRs who have expertise in direct-pay fee matters. There is no right to DRO or *de novo* review. The intent of [38 CFR 3.2600](http://www.ecfr.gov/cgi-bin/text-idx?SID=f0eaed86d103c63f66066edc1bd4e54d&mc=true&node=se38.1.3_12600&rgn=div8) is not to make the DRO procedure applicable to appeals from AOJ decisions regarding eligibility for fees in direct-pay fee situations.  |

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| c. Prohibition on Releasing Funds and Appeal Rights | Regardless of whether the decision on eligibility to fees is an award or denial of fees, do not release funds withheld for attorney or agent fees until the appeal period has expired, or an initiated appeal is finally decided. ***Important:***VA does not honor requests to expedite payment of fees, even when the claimant and/or the attorney or agent have waived the right to appeal. *
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| d.  Releasing Funds Withheld in Appealed Fee Decisions | When a fee eligibility decision is appealed release the amount withheld for fees after * the Statement of the Case was issued and the period for filing a substantive appeal has lapsed, ***or***
* the appeal was perfected and completed with no further appeal possible.

***Notes***:* If BVA or CAVC made the final appellate decision, check with BVA and the OGC, Staff Group (SG) VII, which litigates claims before the CAVC, to make sure the claim is not still on appeal.
* If the Federal Circuit decided the case, or the appeal was in connection with a reasonableness determination, check with OGC SG II to find out whether the case has been finally adjudicated.
* In any appeal where the final appellate decision was made by BVA or the courts, release funds to the claimant or attorney/agent in accordance with the decision made on fee eligibility.
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| e. Releasing Withheld Funds When the Fee Decision Is Not Appealed  | Where the direct pay fee decision is not appealed, the action to take regarding release of funds depends on the date of the NOD for which services were provided. Refer to the following table for guidance.  |

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| If the NOD for which services were provided was received ... | Then ... |
| on or before June 19, 2007, | release funds to the claimant or the accredited attorney according to the fee eligibility decision as provided in this topic. |
| on or after June 20, 2007 | * release funds to the claimant or to the accredited attorney according to the fee eligibility decision as provided in this topic, and
* where eligibility to fees was established and an attorney fee was calculated as provided in M21-1,Part I, 3.C.4.o, follow the guidance in M21-1, Part I, 3.C.5.f.
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| f. Releasing Funds Withheld When an Assessment Is Required | The finance activity will withhold an assessment from payment to the attorney or agent prior to releasing the fees when* the NOD was received on or after June 20, 2007, and
* fees are awarded to an accredited attorney or agent.

The table below describes the process for releasing funds withheld for attorney or agent fees when an assessment is required.  |

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| Stage | Who is Responsible | Description |
| 1 |  AAFC | Computes the assessment up to 5 percent of the fee amount, not to exceed $100.00 at the time the eligibility decision is prepared as provided in M21-1, Part I, 3.C.4.o. |
| 2 | AAFC | Writes a memorandum or sends an e-mail to the finance activity that* asks the finance activity to
* withhold the assessment (sets out the amount of the assessment), and
* release attorney or agent fees, and
* contains the
* amount of the assessment
* name and address of the person to whom the fees should go.
 |
| 3 | Finance activity | Ensures that all amounts due equal the amount in the RO suspense accounts. |
| 4 | Finance activity | * Verifies the AAFC’s computations, and
* transfers the assessment amount into the General Fund Receipt account 36 3220.
 |
| 5 | Finance activity | Pays the balance due the agent or attorney based on current procedures. |

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| ***Note***: VA can deduct an assessment fee of up to 5 percent of the past due benefit payment, up to $100, each time fees are paid under [38 CFR 14.636(h)](http://www.ecfr.gov/cgi-bin/text-idx?SID=9bfb0970cef51faf8145917a4622297d&mc=true&node=se38.1.14_1636&rgn=div8). An assessment is required each time an award action is taken on an issue under fee agreement, including on a “downstream” issue. (***Example***: If the original issue was entitlement to service connection, downstream issues would include the effective date of the grant and/or evaluation of the disability.) |

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| e. Releasing Funds Withheld When an Assessment Is Not Required | The table below describes the process for releasing funds withheld for attorney fees when an assessment is not required for cases in which the NOD was received on or before June 19, 2007.  |

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| Stage | Who Is Responsible | Description |
| 1 | AAFC | Writes and signs a memorandum or sends an e-mail to the finance activity that* asks the finance activity to release the attorney fees, and
* provides the name and address of the person to whom the fees should go.
 |
| 2 | Finance activity | Releases funds.***Note***: The finance activity should *not* release funds unless the RO AAFC has signed the memorandum. |

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| f. If the Claimant Dies Before the Rating Decision Is Promulgated | If the claimant dies after the rating decision is signed and dated by the decision-maker, but before the decision is promulgated (in other words, before the 20 percent or less has been withheld)* compute the amount of fees
* withhold the fees, and
* make a fee eligibility decision.

***Important***: Take the same action if, in a claim on remand from BVA, the claimant dies after service connection is granted by the AOJ. Where the disability percentage and effective date were assigned by the AOJ, this would leave only clerical tasks to be completed before the rating decision was issued. ***Note***: If there is no accrued claimant, then the balance of the past-due benefits (80 percent) is not released, but is kept in VA’s entitlement fund.***Reference***: For more information on accrued benefits, see M21-1, Part VIII. |

#### 6. Reasonableness Review of Fees by OGC

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| Introduction | This topic contains information on OGC attorney or agent fee reasonableness reviews, including* what is a reasonableness review
* time limit for motions for reasonableness review
* statements that possibly constitute requests for reasonableness review
* referral required by fee eligibility for multiple attorneys/agents,
* the importance of prompt referrals to OGC, and
* the process of RO referrals for reasonableness review.
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| Change Date | July 31, 2015 |

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| a. What is a Reasonableness Review | 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, 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. ***Reference***: For more information on motions for reasonableness reviews see the OGC Fact Sheet “[How to Challenge a Fee](http://www.va.gov/OGC/docs/Accred/HowtoChallengeaFee.pdf).”  |

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| b. Time Limit for Motions For Reasonableness Review | OGC may only review the fee agreement on motion ***before the expiration of 120 days after final VA action***. In most cases final VA action means 120 days from the date of the fee eligibility decision.  |

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| c. Statements that Possibly Constitute Requests for Reasonableness Review | 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 a reasonableness review. ***References***: For more information on * required referral for reasonableness review in cases involving multiple attorneys or agents, see M21-1, Part I, 3.C.6.d, and
* the RO process for referrals for reasonableness review, see M21-1, Part I, 3.C.6.f.
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| d. Referral Required by Fee Eligibility for Multiple Attorneys or Agents | An RO eligibility determination under M21-1, Part I, 3.C.4 finding two or more attorneys /agents eligible for payment of fees must be referred to OGC for a reasonableness review regardless of whether the claimant submits any statement implicating reasonableness of fees. |

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| e. Importance of Prompt Referrals to OGC | It is ***urgent*** to provide information necessary for OGC’s reasonableness review ***on the earliest possible date*** after a statement is received from the claimant that can be construed as a possible reasonableness request or after a determination is made finding multiple agents or attorneys eligible to fees. ***Do not delay referral*** of cases implicating reasonableness review to OGC. ***Explanation***: Timely action by VBA in forwarding information to OGC on possible requests for reasonableness review maximizes the potential that in cases where a claimant’s motion is deficient in some respect, OGC will be able to reach out to the claimant for corrective action before the expiration of the 120-day filing deadline.  |

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| f. RO Process for Referrals for Reasonableness Review  | The table below shows the stages in RO referrals to OGC for reasonableness reviews. . |

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| Stage | Description |
| 1 | The AOJ writes the claimant and informs him/her that the AOJ is forwarding his/her statement to OGC for evaluation of whether it meet the requirements for a request for reasonableness review.***Important***: Send the OGC Fact Sheet “[How to Challenge a Fee](http://www.va.gov/OGC/docs/Accred/HowtoChallengeaFee.pdf)” with the notification.  |
| 2 | The AOJ provides information to OGC. During this stage the AAFC * emails the OGC contact for reasonableness challenges at erick.winford@va.gov explaining that either
* the AOJ has received a written communication from the claimant that is possibly a request for reasonableness review, or
* two or more attorneys /agents have been found eligible for payment of fees, and
* includes with the email
* the written communication from the claimant interpreted as a reasonableness review, and
* a copy of the attorney or agent fee eligibility decision(s).

***Notes***: * The AAFC is expected to
* ensure that the email is clear on whether the dispute involves one attorney/agent or multiple attorneys/agents., and
* upload a copy of the email to OGC into VBMS.
* The AAFC is also expected to check VBMS to confirm that the following fee-related documents are labeled so that they can be identified by OGC
* the fee agreement(s)
* all VA POA forms ([*VA Form 21-22a*](http://www.vba.va.gov/pubs/forms/VBA-21-22A-ARE.pdf)and[*VA Form 21-22*](http://www.vba.va.gov/pubs/forms/VBA-21-22-ARE.pdf)) for individuals and organizations that provided representation during the course of the claim, and
* the benefits decision that resulted in the award of fees.
* Retain the claims folder at this stage of the process.
* OGC may pull other documents needed for its review from VBMS.
 |
| 3 | Upon receipt of the claimant’s information from the AOJ, OGC* reviews the information provided, and
* (if necessary) informs the claimant in writing of the requirements in [38 CFR 14.636(i)](http://www.ecfr.gov/cgi-bin/text-idx?SID=7c8f90d08160838eff7394bf01103d9e&mc=true&node=se38.1.14_1636&rgn=div8) for requesting OGC review of the fee agreement for reasonableness.
 |
| 4 | OGC may request the claims folder from the AOJ after * OGC has received
* the claimant’s request for review (or NOD that the AOJ has interpreted as a request for review)
* the attorney or agent’s response, and
* the claimant’s reply, or
* the time for filing such items has expired.

***Note***: Do not send the claims folder unless OGC requests it. |
| 5 | OGC * issues a decision in the matter, and
* retains the claims folder until the time for filing an NOD with OGC under [38 U.S.C. 7105A](http://www.law.cornell.edu/uscode/html/uscode38/usc_sec_38_00007105---A000-.html) (contested claims) has expired.
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| 6 | If an NOD is not received before the expiration of the time for filing an NOD, OGC will return the claims folder to the AOJ. |

#### 7. Failure to Withhold Past-Due Benefits

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| Introduction | This topic contains information on failure to withhold past-due benefits, including* when to consider failure to withhold past due benefits
* failure to withhold past due funds
* initial action when failure to withhold past-due benefits is discovered
* action to take if the claimant returns the funds
* action to take if the claimant does not return the funds, and
* when the attorney or agent is not entitled to direct payment of fees.
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| a. When to Consider Failure to Withhold Past Due Benefits | Consider the guidance in this topic when* direct payment of fees is at issue as provided in Part I, 3.C.1.g, ***and***
* VA has awarded and released past due benefits to the claimant (see Part I, 3.C.2.a, stage 9), ***but***
* no portion of the claimant’s benefit was actually withheld for direct payment of attorney fees

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| b. Failure to Withhold Past-Due Benefits | VA’s failure to withhold a portion of the claimant’s past due benefits for possible direct payment of fees does not relieve VA of its obligation to pay an attorney or agent the fees to which he or she is otherwise entitled. *See* [*Snyder v. Gober*](http://vbaw.vba.va.gov/bl/21/advisory/CAVCDAD.htm#bms), 14 Vet. App. 154 (2000), which overruled the second holding of [VAOPGCPREC 27-92](http://www.va.gov/ogc/docs/1992/PREC_27-92.pdf). |

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| c.  Initial Action When Failure to Withhold Past-Due Benefits Is Discovered | When the evidence makes out the showing specified in M21-1, Part I, 3.C.7.a, immediately contact the claimant and attempt to recover the amount requested as direct payment of fees (20 percent or less). Compute the direct-pay fee amount (20 percent or less) based upon the amount of past due benefits through the date of the decision.  |

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| d. Action to Take if Claimant Returns the Funds | If the claimant returns the funds, follow the normal procedures for * making a direct-pay fee eligibility determination per M21-1, Part I, 3.C.4, and
* releasing the funds to the attorney or agent and appeals per M21-1, Part I, 3.C.5.
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| e. Action to Take if Claimant Does Not Return the Funds | If the claimant does not return the funds, prepare a direct-pay fee eligibility determination according to the normal procedures in M21-1, Part I, 3.C.4. If you find the attorney or agent to be entitled to direct payment of fees * send the attorney or agent and the claimant the “*Summary of Case Fee Decision Notice”* using the [Letter Creator](http://vbacodmoint1.vba.va.gov/bl/21/LetterGenerator/LG.asp) on the [Rating Job Aids](http://vbaw.vba.va.gov/bl/21/rating/rat00.htm) page of the Compensation Service website
* Using the [Letter Creator](http://vbacodmoint1.vba.va.gov/bl/21/LetterGenerator/LG.asp) on the [Rating Job Aids](http://vbaw.vba.va.gov/bl/21/rating/rat00.htm) page of the Compensation Service website send the *Debt to Veteran for Failure to Withhold Attorney Fee Letter*, only to the claimant and representative, if any, **at the same time** as the fee eligibility is sent to the claimant and the attorney or agent, and
* after the due process period expires, send the claimant the final notice shown in M21-1, Part I, 3.C.13, Exhibit 6.

***Note***: The due process notice advises the claimant that VA * has found the attorney or agent entitled to fees, and
* will be creating a debt against the claimant’s account at the same time that VA pays the attorney or agent.
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| f. When the Attorney or Agent Is Not Entitled to Direct Payment of Fees | When the attorney or agent is not entitled to direct payment of fees, send the attorney or agent and the claimant the *Summary of Case Fee Decision Notice* using the [Letter Creator](http://vbacodmoint1.vba.va.gov/bl/21/LetterGenerator/LG.asp) on the [Rating Job Aids](http://vbaw.vba.va.gov/bl/21/rating/rat00.htm) page of the Compensation Service website.  |

#### 8. Exhibit 1: Decision Notice – No Valid POA

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| Introduction | This topic contains a sample direct fee decision notice to send when there was not a valid POA. |

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| a. Decision Notice – No Valid POA, Page 1  | Below is page 1 of a sample notice to send when the representative has not submitted a valid [*VA Form 21-22a*](http://www.vba.va.gov/pubs/forms/VBA-21-22A-ARE.pdf) to establish POA.***Important***: Use the same format below to send separately addressed notices to both the attorney or agent and the claimant. |

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| **[Attorney/Agent’s OR Claimant’s Name]****[Attorney/Agent’s OR Claimant’s Address]**Re: **[Veteran’s claim number and claimant’s name]**Dear **[attorney/agent’s OR claimant’s name]**:Summary of the Case An accredited1 attorney or agent properly filed a valid direct-pay fee agreement per the provisions of 38 CFR 14.636(g) in the above-cited case. (See generally 38 CFR 14.636 for regulatory provisions relating to the payment of fees.) The fee agreement shows that the claimant and attorney/agent request that the Department of Veterans Affairs (VA) pay **[percentage]** of the claimant’s award of past-due benefits directly to the attorney/agent if all legal criteria for the payment of fees are met. In a rating **[or Court or Board of Veterans’ Appeals]** decision dated **[date]**, the following claims were awarded to the claimant: **[list claims]**. The amount of past-due benefits, which is computed from the effective date of the award through the date of the decision, is **[amount]**. **Requirements for Direct Payment of Fees**Per 38 CFR 14.631(a), a valid power of attorney is required in order to represent a claim before VA. Per 38 U.S.C. 5904, fees may not be charged, allowed, or paid with respect to services of agents and attorneys before the date on which a notice of disagreement (NOD) is filed with respect to the case. In addition to the requirement that services must be performed after the filing of a NOD, VA’s regulation, 38 CFR 14.636(h), provides that if a fee agreement specifies that fees are to be paid directly by VA to an agent or attorney from past due benefits, the following requirements must be met for direct payment of fees:* The total fee payable cannot exceed 20 percent of past-due benefits.
* The fee must be contingent on a favorable outcome, and
* The award of past-due benefits must result in a cash payment to the claimant.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_1. Note: Attorneys need not have been accredited under current 38 CFR 14.626-14.637 if representation was initiated, and the claim was filed, before the effective date of those regulations, June 23, 2008. |

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| b. Decision Notice – No Valid POA, Page 2 | Below is page 2 of a sample notice to send when the representative is not accredited. |

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| For NODs filed on or after June 20, 2007, if the above conditions are met, fees may be paid directly to the agent or attorney. In addition to the above requirements, section 14.636(c)(2) provides that for NODs filed on or before June 19, 2007, agents and attorneys may charge only for services provided after both of the following additional conditions have been met:* A final decision was promulgated by the Board of Veterans’ Appeals (BVA) with respect to the issue, or issues, involved in the appeal, and
* The attorney or agent was retained not later than one year following the date that the BVA decision was promulgated.
* This condition will be met with respect to all successor attorneys or agents acting in the continuous prosecution of the same matter if the predecessor was hired within the required timeframe.
* This limitation does not apply if the agent or attorney was retained while the case was pending before a court.

**What We Decided and Why**There was no valid power of attorney filed at any time before the decision awarding benefits in this case. Therefore, as a matter of law, the attorney/agent could not have provided services with respect to this claim. As a result, direct payment of fees is denied.**If You Think We Are Wrong**If you disagree with this determination, you may file a notice of disagreement with this decision. For more information on filing an appeal, see the enclosed *VA Form 4107c, Your Rights to Appeal Our Decision – Contested Claims.* Sincerely,Veterans Service Center Manager OR Pension Management Center ManagerEnclosure: *VA Form 4107c* |

#### 9. Exhibit 2: Decision Notice – No Fee Agreement and/or Valid POA (Survivor)

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| Introduction | This topic contains a sample direct fee decision notice to send when, in a case involving a survivor, there was not a fee agreement and/or a valid [*VA Form 21-22a*](http://www.vba.va.gov/pubs/forms/VBA-21-22A-ARE.pdf) to establish POA. |

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| a. Decision Notice – No Fee Agreement and/or Valid POA (Survivor) Page 1 | Below is page 1 of a sample notice to send in a case involving a survivor when there is not a fee agreement and/or a valid POA.***Important***: Use the same format below to send separately addressed notices to both the attorney or agent and the claimant. |

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| **[Attorney/Agent’s OR Claimant’s Name]****[Attorney/Agent’s OR Claimant’s Address]**Re: **[Veteran’s claim number and claimant’s name]**Dear **[attorney/agent’s OR claimant’s name]**:Summary of the Case An accredited1 attorney or agent filed a direct-pay fee agreement in relationship to the above-cited case. (See generally 38 CFR 14.636 for regulatory provisions relating to the payment of fees.) The fee agreement shows that the parties request that the Department of Veterans Affairs (VA) pay **[percentage]** of the claimant’s award of past-due benefits directly to the attorney/agent if all legal criteria for the payment of fees are met. In a rating **[or Court or Board of Veterans’ Appeals]** decision dated **[date]**, the following claims were awarded to the claimant: **[list claims]**. The amount of past-due benefits, which is computed from the effective date of the award through the date of the decision, is **[amount]**. **Requirements for Direct Payment of Fees**Per 38 CFR 14.631(a), a valid power of attorney is required in order to represent a claim before VA. Per 38 U.S.C. 5904, fees may not be charged, allowed, or paid with respect to services of agents and attorneys before the date on which a notice of disagreement (NOD) is filed with respect to the case. In addition to the requirement that services must be performed after the filing of a NOD, VA’s regulation, 38 CFR 14.636(h), provides that if a fee agreement specifies that fees are to be paid directly by VA to an agent or attorney from past due benefits, the following requirements must be met for direct payment of fees:* The total fee payable cannot exceed 20 percent of past-due benefits.
* The fee must be contingent on a favorable outcome, and
* The award of past-due benefits must result in a cash payment to the claimant.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_1. Attorneys need not have been accredited under current 38 CFR 14.626-14.637 if representation was initiated, and the claim was filed, before the effective date of those regulations, June 23, 2008. |

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| b. Decision Notice – No Fee Agreement and/or Valid POA (Survivor) Page 2 | Below is page 2 of a sample notice to send in a case involving a survivor when there is not a fee agreement and/or a valid POA representative is not accredited. |

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| For NODs filed on or after June 20, 2007, if the above conditions are met, fees may be paid directly to the agent or attorney. In addition to the above requirements, section 14.636(c)(2) provides that for NODs filed on or before June 19, 2007, agents and attorneys may charge only for services provided after both of the following additional conditions have been met:* A final decision was promulgated by the Board of Veterans’ Appeals (BVA) with respect to the issue, or issues, involved in the appeal, and
* The attorney or agent was retained not later than one year following the date that the BVA decision was promulgated.
* This condition will be met with respect to all successor attorneys or agents acting in the continuous prosecution of the same matter if the predecessor was hired within the required timeframe.
* This limitation does not apply if the agent or attorney was retained while the case was pending before a court.

**What We Decided and Why** There was no **[fee agreement and/or 21-22a]** filed at any time in connection with the award in this case. As a result, direct payment of fees is denied. A survivor’s entitlement to benefits is separate and distinct from the entitlement of the deceased veteran or another survivor. Therefore, documentation pertaining to representation of one of those individuals is not sufficient to support eligibility for direct payment of fees in this case. *See Hyatt v. Shinseki*, 566 F.3d 1364, 1367 (Fed. Cir. 2009); *Hanlin v. Nicholson*, 19 Vet. App. 350, 354-355 (2005). **If You Think We Are Wrong**If you disagree with this determination, you may file a notice of disagreement with this decision. For more information on filing an appeal, see the enclosed *VA Form 4107c, Your Rights to Appeal Our Decision – Contested Claims.* Sincerely,Veterans Service Center Manager OR Pension Management Center ManagerEnclosure: *VA Form 4107c* |

#### 10. Exhibit 3: Decision Notice – No NOD Filed (Survivor)

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| Introduction | This topic contains a sample direct fee decision notice to send when, in a case involving a survivor, no NOD had been filed. |

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| Change Date | July 31, 2015 |

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| a. Decision Notice – No NOD Filed (Survivor) Page 1 | Below is page 1 of a sample notice to send in a case involving a survivor when a NOD has not been filed. ***Important***: Use the same format below to send separately addressed notices to both the attorney or agent and the claimant. |

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| **[Attorney/Agent’s OR Claimant’s Name]****[Attorney/Agent’s OR Claimant’s Address]**Re: **[Veteran’s claim number and claimant’s name]**Dear **[attorney/agent’s OR claimant’s name]:**Summary of the Case An accredited1 attorney or agent properly filed a valid direct-pay fee agreement per the provisions of 38 CFR 14.636(g) in the above-cited case. (See generally 38 CFR 14.636 for regulatory provisions relating to the payment of fees.) The fee agreement shows that the claimant and attorney/agent request that the Department of Veterans Affairs (VA) pay **[percentage]** of the claimant’s award of past-due benefits directly to the attorney/agent if all legal criteria for the payment of fees are met. In a rating decision dated **[date]**, the following claims were awarded to the claimant: **[list claims]**. The amount of past-due benefits, which is computed from the effective date of the award through the date of the decision, is **[amount]**. **Requirements for Direct Payment of Fees**Per 38 U.S.C. 5904, fees may not be charged, allowed, or paid with respect to services of agents and attorneys before the date on which a notice of disagreement (NOD) is filed with respect to the case. In addition to the requirement that services must be performed after the filing of a NOD, VA’s regulation, 38 CFR 14.636(h), provides that if a fee agreement specifies that fees are to be paid directly by VA to an agent or attorney from past due benefits, the following requirements must be met for direct payment of fees:* The total fee payable cannot exceed 20 percent of past-due benefits.
* The fee must be contingent on a favorable outcome, and
* The award of past-due benefits must result in a cash payment to the claimant.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_1. Attorneys need not have been accredited under current 38 CFR 14.626-14.637 if representation was initiated, and the claim was filed, before the effective date of those regulations, June 23, 2008. |

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| b. Decision Notice – No NOD Filed (Survivor) Page 2 | Below is page 2 of a sample notice to send in a case involving a survivor when a NOD has not been filed.  |

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| For NODs filed on or after June 20, 2007, if the above conditions are met, fees may be paid directly to the agent or attorney. In addition to the above requirements, section 14.636(c)(2) provides that for NODs filed on or before June 19, 2007, agents and attorneys may charge only for services provided after both of the following additional conditions have been met:* A final decision was promulgated by the Board of Veterans’ Appeals (BVA) with respect to the issue, or issues, involved in the appeal, and
* The attorney or agent was retained not later than one year following the date that the BVA decision was promulgated.
* This condition will be met with respect to all successor attorneys or agents acting in the continuous prosecution of the same matter if the predecessor was hired within the required timeframe.
* This limitation does not apply if the agent or attorney was retained while the case was pending before a court.

**What We Decided and Why**There was no NOD filed at any time in connection with the award in this case. As a result, direct payment of fees is denied. A survivor’s entitlement to benefits is separate and distinct from the entitlement of the deceased veteran or another survivor. Therefore, an NOD filed by one of those individuals is not sufficient to support eligibility for direct payment of fees in this case. *See Hyatt v. Shinseki*, 566 F.3d 1364, 1367 (Fed. Cir. 2009); *Hanlin v. Nicholson*, 19 Vet. App. 350, 354-355 (2005). **If You Think We Are Wrong**If you disagree with this determination, you may file a notice of disagreement with this decision. For more information on filing an appeal, see the enclosed *VA Form 4107c, Your Rights to Appeal Our Decision – Contested Claims.* Sincerely, Veterans Service Center Manager OR Pension Management Center ManagerEnclosure: *VA Form 4107c* |

#### 11. Exhibit 4: Decision Notice – No Cash Payment to the Claimant

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| Introduction | This topic contains a sample direct fee decision notice to send when there has not been any cash payment to the claimant. |

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| Change Date | July 31, 2015 |

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| a. Decision Notice – No Cash Payment, Page 1 | Below is page 1 of a sample notice to send in a case where there has not been any cash payment to the claimant. ***Important***: Use the same format below to send separately addressed notices to both the attorney or agent and the claimant. |

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| **[Attorney/Agent’s OR Claimant’s Name]****[Attorney/Agent’s OR Claimant’s Address]**Re: **[Veteran’s claim number and claimant’s name]**Dear **[attorney/agent’s OR claimant’s name]:**Summary of the Case An accredited1 attorney or agent properly filed a valid direct-pay fee agreement per the provisions of 38 CFR 14.636(g) in the above-cited case. (See generally 38 CFR 14.636 for regulatory provisions relating to the payment of fees.) The fee agreement shows that the claimant and attorney/agent request that the Department of Veterans Affairs (VA) pay **[percentage]** of the claimant’s award of past-due benefits directly to the attorney/agent if all legal criteria for the payment of fees are met. In a rating **[or Court or Board of Veterans’ Appeals]** decision dated **[date]**, the following claims were awarded to the claimant: **[list claims]**. The amount of past-due benefits, which is computed from the effective date of the award through the date of the decision, is subject to offset due to the claimant’s **[insert reason for offset [e.g. concurrent receipt of military retired pay, recoupment of a prior overpayment]]**. Therefore, this award will not result in a cash payment of past-due benefits to the veteran.Requirements for Direct Payment of FeesPer 38 U.S.C. 5904, fees may not be charged, allowed, or paid with respect to services of agents and attorneys before the date on which a notice of disagreement (NOD) is filed with respect to the case. In addition to the requirement that services must be performed after the filing of a NOD, VA’s regulation, 38 CFR 14.636(h), provides that if a fee agreement specifies that fees are to be paid directly by VA to an agent or attorney from past due benefits, the following requirements must be met for direct payment of fees:* The total fee payable cannot exceed 20 percent of past-due benefits.
* The fee must be contingent on a favorable outcome, and
* The award of past-due benefits must result in a cash payment to the claimant.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_1. Attorneys need not have been accredited under current 38 CFR 14.626-14.637 if representation was initiated, and the claim was filed, before the effective date of those regulations, June 23, 2008. |

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| b. Decision Notice – No Cash Payment, Page 2 | Below is page 2 of a sample notice to send in a case where there has not been any cash payment to the claimant. |

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| For NODs filed on or after June 20, 2007, if the above conditions are met, fees may be paid directly to the agent or attorney. In addition to the above requirements, section 14.636(c)(2) provides that for NODs filed on or before June 19, 2007, agents and attorneys may charge only for services provided after both of the following additional conditions have been met:* A final decision was promulgated by the Board of Veterans’ Appeals (BVA) with respect to the issue, or issues, involved in the appeal, and
* The attorney or agent was retained not later than one year following the date that the BVA decision was promulgated.
* This condition will be met with respect to all successor attorneys or agents acting in the continuous prosecution of the same matter if the predecessor was hired within the required timeframe.
* This limitation does not apply if the agent or attorney was retained while the case was pending before a court.

**What We Decided and Why**The NOD in this case was filed on **[date]**. Based upon the law in effect at the time the NOD was filed, direct payment of fees is denied. Direct payment of fees is denied because the following requirement has not been met: The award of past-due benefits did not result in a cash payment to the claimant. **[Insert this sentence** if the offset was due to concurrent receipt of military retired pay and the veteran may be entitled to CRDP or CRSC.] In the event that the Department of Defense determines that the veteran is eligible for concurrent receipt of military retired pay and VA Compensation, thereby creating a cash payment to the veteran, VA will issue another decision regarding direct payment of attorney fees]. **If You Think We Are Wrong**If you disagree with this determination, you may file a notice of disagreement with this decision. For more information on filing an appeal, see the enclosed *VA Form 4107c, Your Rights to Appeal Our Decision – Contested Claims.* Sincerely,Veterans Service Center Manager OR Pension Management Center ManagerEnclosure: *VA Form 4107c* |

#### 12. Exhibit 5: Direct-Pay Fee Decision Notice – Direct-Pay Fee Agreement Filed by More Than One Attorney/Agent

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| Introduction | This topic contains a sample notice to send the attorney or agent and claimant when more than one attorney/agent has filed a direct-pay fee agreement. |

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| Change Date | February 29, 2012 |

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| a. Fee Decision Notice –More Than One Attorney/Agent Filed a Direct-Pay Fee Agreement | Below is page 1 of the sample notice to send the attorney or agent and claimant when more than one attorney/agent has filed a direct-pay fee agreement.***Note***: Send a copy of the direct-pay fee decision shown below to each attorney or agent and to the claimant. |

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| [Attorney/Agent’s OR Claimant’s Name]**[Attorney/Agent’s OR Claimant’s Address]**Re: **[Veteran’s claim number and claimant’s name]**Dear **[attorney/agent’s OR claimant’s name]**:**Summary of the Case**A valid direct-pay fee agreement signed by the Veteran on **[date]**, with Attorney/Agent 1, was filed with the regional office on **[date],** and a valid direct-pay fee agreement signed by the Veteran on **[date]**, with Attorney/Agent 2, was filed at the regional office on **[date]** in connection with the above-cited case. Twenty percent **[or less depending on terms of fee agreements]** of past due benefits through the date of the **[date]**, rating decision has been withheld for possible payment of fees. The amount withheld for possible payment of fees is **[amount]**. Note that an assessment of $100.00 will be withheld from this amount, resulting in a net amount of **[amount]**. There was a **[date of NOD here]** notice of disagreement (NOD) filed in this case.**Requirements for Direct Payment of Fees**Per 38 U.S.C. 5904, fees may not be charged, allowed or paid with respect to services of agents and attorneys before the date on which a notice of disagreement (NOD) is filed with respect to the case. In addition to the requirement that services must be performed after the filing of a NOD, VA’s regulation, 38 CFR 14.636(h), provides that if a fee agreement specifies that fees are to be paid directly by VA to an agent or attorney from past due benefits, the following requirements must be met for direct payment of fees:* The total fee payable cannot exceed 20 percent of past-due benefits
* The fee must be contingent on a favorable outcome, and
* The award of past due benefits must result in a cash payment to the claimant.
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| b. Fee Decision Notice – More Than One Attorney/Agent Filed a Direct-Pay Fee Agreement – Page 2  | Below is page 2 of the sample notice to send the attorney or agent and claimant when more than one attorney/agent has filed a direct-pay fee agreement. |

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| For NODs filed on or after June 20, 2007, if the above conditions are met, fees may be paid directly to the agent or attorney. In addition to the above requirements, section 14.636(c)(2) provides that for NODs filed on or before June 19, 2007, agents and attorneys may charge only for services provided after both of the following additional conditions have been met:* A final decision was promulgated by the Board of Veterans’ Appeals (BVA) with respect to the issue, or issues, involved in the appeal, and
* The attorney or agent was retained not later than one year following the date that the BVA decision was promulgated.
* This condition will be met with respect to all successor attorneys or agents acting in the continuous prosecution of the same matter if the predecessor was hired within the required timeframe.
* This limitation does not apply if the agent or attorney was retained while the case was pending before a court.

**What We Decided and Why****[Use the following paragraph if each attorney/agent is entitled to the entire 20% (or less) fee:]**In this case, the NOD was filed on **[date]** and all of the requirements for direct payment of fees have been met by both **[attorney/agent 1]** and by **[attorney/agent 2]**. Since each attorney/agent meets the legal criteria for payment of the entire 20 percent of past due benefits, the case will be immediately referred to the Office of General Counsel for a reasonableness determination (prior to expiration of the appeal period) and fees will not be distributed until OGC determines the amount, if any, that is reasonably payable to each attorney from the 20 percent. **[Use the following paragraph if only one attorney/agent is legally entitled to fees, but not the other.]**In this case, the NOD was filed on **[date]** and all of the requirements for direct payment of fees have been met by **[attorney/agent 1]** but not by **[attorney/agent 2]**. The following criteria have not been met by **[attorney/agent 2]**: **[List criteria that were not met]** As a result, if no appeal is received in accordance with the attached notice, VA will pay **[attorney or agent 1]** a fee in the amount of **[amount after assessment deducted]**. Per the provisions of 38 U.S.C. 5904(a)(6), an assessment in the amount of **[amount]** has been deducted from the fees. |

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| c. Fee Decision Notice – More Than One Attorney/Agent Filed a Direct-Pay Fee Agreement – Page 3 | Below is page 3 of the sample notice to send the attorney or agent and claimant when more than one attorney/agent has filed a direct-pay fee agreement. |

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| [Use one of the following three paragraphs for a denial of the direct payment of fees:]There was no NOD filed at any time in connection with the award in this case. As a result, direct payment of fees is denied.**[OR]**The NOD in this case was filed on **[date]**. Based upon the law in effect at the time the NOD was filed, direct payment of fees is denied. Direct payment of fees is denied because neither representative has met the following requirement or requirements: **[List requirements that have not been met by each attorney/agent.]****[OR]**No direct-pay fee agreement was filed with the agency of original jurisdiction within 30 days of its execution as required by 38 CFR 14.636(h)(4).**If You Think We Are Wrong**If you disagree with this determination, you may file a notice of disagreement with this decision. For more information on filing an appeal, see the enclosed *VA Form 4107c, Your Rights to Appeal Our Decision – Contested Claims.* Sincerely,Veterans Service Center Manager OR Pension Management Center ManagerEnclosure: *VA Form 4107c* |

#### 13. Exhibit 6: Fee Recoupment Procedures – Final Notice

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| Introduction | This topic contains a sample of the final notice to the claimant advising him/her an overpayment was created for recoupment of fees. |

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| Change Date | February 29, 2012 |

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| a. Final Notice to Claimant – Overpayment Created – Page 1 | Below is page 1 of the final notice to the claimant advising him/her of the overpayment created to recoup fees that VA failed to withhold. |

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| Claimant’s Name]**Claimant’s Address]**Re: **[Veteran’s claim number and claimant’s name]**Dear **[claimant’s name]**:In our letter of **[date of proposal letter]**, we explained that VA mistakenly overlooked the filing of the direct-pay fee agreement and did not withhold any amount for fees from the **[date of rating decision]** award. This action by VA resulted in an overpayment to you. After our failure to withhold, your attorney/agent was found to be entitled to a fee in the amount of **[amount]**, and VA has paid this amount to your attorney/agent. In our **[date of letter]** letter, we explained that we would recoup this amount if we did not hear back from you within 60 days. **[Select one of the following, either A or B, as appropriate and place at the end of this paragraph.]****[A]** We did not receive a response to our letter. We have determined that you owe a debt to VA and have created an overpayment in the amount of **[amount]**.**[B]** We received the following information from you. **[List information.]** After reviewing this information, we have determined that you owe a debt to VA and have created an overpayment in the amount of **[amount]**. **What You Owe** Because VA did not withhold the attorney’s fee from your **[date of rating decision]** award, you have been paid too much. The amount of the overpayment is **[amount]**. In a letter from VA’s Debt Management Center, we will tell you how you can repay this debt. You may submit the evidence outlined in our letter of **[date of proposal letter]** at any time, and we will reevaluate the amount of your overpayment. |

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| b. Final Notice to Claimant – Overpayment Created – Page 2 | Below is page 2 of the final notice to the claimant advising him/her of the overpayment created to recoup fees that VA failed to withhold.  |

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| What You Should Do If You Disagree With Our DecisionIf you do not agree with our decision, you should write and tell us why. You have *one year from the date of this letter to appeal the decision.* The enclosed *VA Form 4107, Your Rights to Appeal Our Decision,* explains the appeals process. **If You Have Questions or Need Assistance**If you have any questions, you may contact us by telephone, e-mail, or letter. If you* telephone, call us at 1-800-827-1000 (***Note***: If you use a Telecommunications Device for the Deaf (TDD), the number is 1-800-829-4833.)
* use the Internet, send electronic inquiries through the Internet at <https://iris.va.gov>, or
* write
* put your full name and VA file number on the letter, and
* send all correspondence to the address at the top of this letter.

 In all cases, be sure to refer to your VA file number **[claim number]**.If you are looking for general information about benefits and eligibility, you should visit our website at https://www.va.gov, or search the Frequently Asked Questions (FAQs) at <https://iris.va.gov>.Sincerely,Veterans Service Center Manager OR Pension Management Center Manager |