

Clarification on Charging a Fee for Processing an Application for Veterans Benefits

38 USC sections 5901, 5902, 5903, 5904 and 5905 cover prohibitions for representatives, allowable practices for representatives and who can be a representative for a veteran in the filing of a claim.

We have included in this addendum all of 38 USC Chapter 59 with amendments. We also include a Federal appeals court decision concerning the challenge of payment to a third-party for filing a claim. Finally we include a letter from Tim McClain, VA General Counsel, to the Hon. Lane Evans, ranking Democratic member of the House Committee on Veterans Affairs, dated May 24, 2004. The letter addresses, directly, charging a fee for advice relating to a claim. The source of this document is: <http://veterans.house.gov/democratic/officialcorr/pdf/5-24-04attorneys.pdf>

Our purpose here is not to offer legal interpretation. You must make up your own mind what is acceptable based on current rules and regulations. Our enclosed material is not all-inclusive but can give you great insight into the attitude of the Department of Veterans Affairs. Here is how the National Care Planning Council would handle a typical case regarding charging fees:

- 1. From the letter from VA General Counsel, it appears to be acceptable to VA that we can charge for advice relating to the filing of a claim but not charge for filling out and filing a claim.**

- 2. It is our opinion that home care agencies, nursing homes and assisted living facilities that pay a specialist to file a claim on behalf of one of their residents or clients are in violation of the third-party fee provisions allowed by VA. We believe it is an obvious intent to circumvent the statute.**

VA does allow disinterested third party organizations to pay someone to file an application on behalf of the veteran--based on 38 C.F.R. § 20.609(d) (1992). This regulation, addressing disinterested third-party fee payers, provides that “[a]n attorney-at-law or agent may receive a fee or salary from an organization, governmental entity, or other disinterested third party for representation of a claimant or appellant even though the conditions set forth in paragraph (c) (38 USC section 5904) [regarding fees for services after a final decision by the DVA] have not been met.”

VA amended its rules pertaining to this regulation on May 23, 2002. The following rules now apply:

- ◆ First, it prohibits an attorney or agent from charging a fee contingent, in whole or in part, upon whether the matter is resolved favorably to the claimant or appellant.

- ◆ Second, it establishes a rebuttable presumption that the spouse, child, or parent of the claimant, or a person residing with the claimant, is not a disinterested third party.

- ◆ Third, it requires that all agreements for payment by a third party be in writing, be filed with the Board, and include a certification by the attorney or agent that “no agreement, oral or otherwise, exists under which the claimant or appellant will provide anything of value to the third-party payer . . . in return for payment of [the attorney’s] fee or salary, including, but not limited to, reimbursement of any fees paid.” 38 C.F.R. § 20.609(d)(2); 67 Fed. Reg. at 36,104. (See enclosed court decision for more detail.)

3. We would refer the actual filing of claims on behalf of a veteran to a veterans service organization or to a duly VA appointed representative. We have included a list of these entities in Appendix 1 in this book.

We do believe, however, that all kinds of advice and constructive help (not directly involved in the claims process) should be given prior to the filing of an application or even during the claims process in order to help increase the chance of a successful award. We feel this might include educating clients on what information is required, recommending supportive forms or documents that might be effective in the claims process, providing guidance on VA's asset test, making sure the evidence for recurring medical costs and for a rating is presented in the most favorable manner and providing advice on the steps necessary to complete the application.

In our opinion, the actual process of obtaining documents and filling out forms should be done, free of charge, by the client, family members, a duly appointed power of attorney or a veterans service organization such as a state department of veteran affairs or local VFW.

The accompanying letter from VA General Counsel gives an example in the third to last sentence where an attorney (VA considers any representative for the claimant an attorney) could charge for a pre-filing consultation and complete the application for the veteran pro bono. For various reasons, including the fact that a veterans service organization has a better understanding of all available benefits, we recommend using a veterans service organization for the filing of claims.

Dated April, 2007

Thomas Day

Director, National Care Planning Council

.-CITE-

38 USC CHAPTER 59 - AGENTS AND ATTORNEYS

01/03/05

-EXPCITE-

TITLE 38 - VETERANS' BENEFITS
PART IV - GENERAL ADMINISTRATIVE PROVISIONS
CHAPTER 59 - AGENTS AND ATTORNEYS

-HEAD-

CHAPTER 59 - AGENTS AND ATTORNEYS

-MISC1-

Sec.
5901. Prohibition against acting as claims agent or attorney.
5902. Recognition of representatives of organizations.
5903. Recognition with respect to particular claims.
5904. Recognition of agents and attorneys generally.
5905. Penalty for certain acts.

AMENDMENTS

1991 - Pub. L. 102-40, title IV, Sec. 402(c)(1), May 7, 1991, 105 Stat. 239, renumbered items 3401 to 3405 as 5901 to 5905, respectively.

-End-

-CITE-

38 USC Sec. 5901

01/03/05

-EXPCITE-

TITLE 38 - VETERANS' BENEFITS
PART IV - GENERAL ADMINISTRATIVE PROVISIONS
CHAPTER 59 - AGENTS AND ATTORNEYS

-HEAD-

Sec. 5901. Prohibition against acting as claims agent or attorney

-STATUTE-

Except as provided by section 500 of title 5, no individual may act as an agent or attorney in the preparation, presentation, or prosecution of any claim under laws administered by the Secretary unless such individual has been recognized for such purposes by the Secretary.

-SOURCE-

(Pub. L. 85-857, Sept. 2, 1958, 72 Stat. 1238, Sec. 3401; Pub. L. 91-24, Sec. 12(a), June 11, 1969, 83 Stat. 34; Pub. L. 99-576, title VII, Sec. 701(79), Oct. 28, 1986, 100 Stat. 3298; renumbered Sec. 5901, Pub. L. 102-40, title IV, Sec. 402(b)(1), May 7, 1991, 105 Stat. 238; Pub. L. 102-83, Sec. 4(a)(1), (b)(1), (2)(E), Aug. 6, 1991, 105 Stat. 403-405.)

-MISC1-

AMENDMENTS

1991 - Pub. L. 102-40 renumbered section 3401 of this title as this section.
Pub. L. 102-83, Sec. 4(b)(1), (2)(E), substituted "Secretary" for

"Administrator".

Pub. L. 102-83, Sec. 4(a)(1), substituted "administered by the Secretary" for "administered by the Veterans' Administration".

1986 - Pub. L. 99-576 substituted "such individual" for "he".

1969 - Pub. L. 91-24 substituted "Except as provided by section 500 of title 5, no individual may act" for "No individual may act".

-End-

-CITE-

38 USC Sec. 5902

01/03/05

-EXPCITE-

TITLE 38 - VETERANS' BENEFITS
PART IV - GENERAL ADMINISTRATIVE PROVISIONS
CHAPTER 59 - AGENTS AND ATTORNEYS

-HEAD-

Sec. 5902. Recognition of representatives of organizations

-STATUTE-

(a) (1) The Secretary may recognize representatives of the American National Red Cross, the American Legion, the Disabled American Veterans, the United Spanish War Veterans, the Veterans of Foreign Wars, and such other organizations as the Secretary may approve, in the preparation, presentation, and prosecution of claims under laws administered by the Secretary.

(2) The Secretary may, in the discretion of the Secretary, furnish, if available, space and office facilities for the use of paid full-time representatives of national organizations so recognized.

(b) No individual shall be recognized under this section -

(1) unless the individual has certified to the Secretary that no fee or compensation of any nature will be charged any individual for services rendered in connection with any claim; and

(2) unless, with respect to each claim, such individual has filed with the Secretary a power of attorney, executed in such manner and form as the Secretary may prescribe.

(c) (1) Unless a claimant specifically indicates in a power of attorney filed with the Department a desire to appoint only a recognized representative of an organization listed in or approved under subsection (a), the Secretary may, for any purpose, treat the power of attorney naming such an organization, a specific office of such an organization, or a recognized representative of such an organization as the claimant's representative as an appointment of the entire organization as the claimant's representative.

(2) Whenever the Secretary is required or permitted to notify a claimant's representative, and the claimant has named in a power of attorney an organization listed in or approved under subsection (a), a specific office of such an organization, or a recognized representative of such an organization without specifically indicating a desire to appoint only a recognized representative of the organization, the Secretary shall notify the organization at the address designated by the organization for the purpose of receiving the notification concerned.

(d) Service rendered in connection with any such claim, while not on active duty, by any retired officer, warrant officer, or

enlisted member of the Armed Forces recognized under this section shall not be a violation of sections 203, 205, 206, or 207 of title 18.

-SOURCE-

(Pub. L. 85-857, Sept. 2, 1958, 72 Stat. 1238, Sec. 3402; Pub. L. 91-24, Sec. 12(b), June 11, 1969, 83 Stat. 34; Pub. L. 98-160, title VII, Sec. 703(5), Nov. 21, 1983, 97 Stat. 1010; renumbered Sec. 5902, Pub. L. 102-40, title IV, Sec. 402(b)(1), May 7, 1991, 105 Stat. 238; Pub. L. 102-83, Sec. 4(a)(1), (b)(1), (2)(E), Aug. 6, 1991, 105 Stat. 403-405; Pub. L. 104-275, title V, Sec. 508(a), Oct. 9, 1996, 110 Stat. 3343.)

-MISC1-

AMENDMENTS

1996 - Subsecs. (c), (d). Pub. L. 104-275 added subsec. (c) and redesignated former subsec. (c) as (d).

1991 - Pub. L. 102-40 renumbered section 3402 of this title as this section.

Subsec. (a)(1). Pub. L. 102-83, Sec. 4(b)(1), (2)(E), substituted "Secretary" for "Administrator" in two places.

Pub. L. 102-83, Sec. 4(a)(1), substituted "administered by the Secretary" for "administered by the Veterans' Administration".

Subsecs. (a)(2), (b). Pub. L. 102-83, Sec. 4(b)(1), (2)(E), substituted "Secretary" for "Administrator" wherever appearing.

1983 - Subsec. (a)(1). Pub. L. 98-160, Sec. 703(5)(A), substituted "the Administrator" for "he".

Subsec. (a)(2). Pub. L. 98-160, Sec. 703(5)(B), substituted "the discretion of the Administrator" for "his discretion".

Subsec. (b)(1). Pub. L. 98-160, Sec. 703(5)(C), substituted "the individual" for "he".

Subsec. (c). Pub. L. 98-160, Sec. 703(5)(D), substituted "member" for "man".

1969 - Subsec. (c). Pub. L. 91-24 substituted "sections 203, 205, 206 or 207 of title 18" for "section 281 or 283 of title 18, or a violation of section 99 of title 5".

EFFECTIVE DATE OF 1996 AMENDMENT

Section 508(b) of Pub. L. 104-275 provided that: "The amendments made by this section [amending this section] apply to any power of attorney filed with the Department of Veterans Affairs, regardless of the date of its execution."

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-CITE-

38 USC Sec. 5903

01/03/05

-EXPCITE-

TITLE 38 - VETERANS' BENEFITS
PART IV - GENERAL ADMINISTRATIVE PROVISIONS
CHAPTER 59 - AGENTS AND ATTORNEYS

-HEAD-

Sec. 5903. Recognition with respect to particular claims

-STATUTE-

The Secretary may recognize any individual for the preparation,

presentation, and prosecution of any particular claim for benefits under any of the laws administered by the Secretary if -

(1) such individual has certified to the Secretary that no fee or compensation of any nature will be charged any individual for services rendered in connection with such claim; and

(2) such individual has filed with the Secretary a power of attorney, executed in such manner and in such form as the Secretary may prescribe.

-SOURCE-

(Pub. L. 85-857, Sept. 2, 1958, 72 Stat. 1238, Sec. 3403; renumbered Sec. 5903, Pub. L. 102-40, title IV, Sec. 402(b)(1), May 7, 1991, 105 Stat. 238; Pub. L. 102-83, Sec. 4(a)(1), (b)(1), (2)(E), Aug. 6, 1991, 105 Stat. 403-405.)

-MISC1-

AMENDMENTS

1991 - Pub. L. 102-40 renumbered section 3403 of this title as this section.

Pub. L. 102-83, Sec. 4(b)(1), (2)(E), substituted "Secretary" for "Administrator" in introductory provisions and wherever appearing in pars. (1) and (2).

Pub. L. 102-83, Sec. 4(a)(1), substituted "administered by the Secretary" for "administered by the Veterans' Administration" in introductory provisions.

-End-

-CITE-

38 USC Sec. 5904

01/03/05

-EXPCITE-

TITLE 38 - VETERANS' BENEFITS
PART IV - GENERAL ADMINISTRATIVE PROVISIONS
CHAPTER 59 - AGENTS AND ATTORNEYS

-HEAD-

Sec. 5904. Recognition of agents and attorneys generally

-STATUTE-

(a) The Secretary may recognize any individual as an agent or attorney for the preparation, presentation, and prosecution of claims under laws administered by the Secretary. The Secretary may require that individuals, before being recognized under this section, show that they are of good moral character and in good repute, are qualified to render claimants valuable service, and otherwise are competent to assist claimants in presenting claims.

(b) The Secretary, after notice and opportunity for a hearing, may suspend or exclude from further practice before the Department any agent or attorney recognized under this section if the Secretary finds that such agent or attorney -

(1) has engaged in any unlawful, unprofessional, or dishonest practice;

(2) has been guilty of disreputable conduct;

(3) is incompetent;

(4) has violated or refused to comply with any of the laws administered by the Secretary, or with any of the regulations or instructions governing practice before the Department; or

(5) has in any manner deceived, misled, or threatened any actual or prospective claimant.

(c) (1) Except as provided in paragraph (3), in connection with a proceeding before the Department with respect to benefits under laws administered by the Secretary, a fee may not be charged, allowed, or paid for services of agents and attorneys with respect to services provided before the date on which the Board of Veterans' Appeals first makes a final decision in the case. Such a fee may be charged, allowed, or paid in the case of services provided after such date only if an agent or attorney is retained with respect to such case before the end of the one-year period beginning on that date. The limitation in the preceding sentence does not apply to services provided with respect to proceedings before a court.

(2) A person who, acting as agent or attorney in a case referred to in paragraph (1) of this subsection, represents a person before the Department or the Board of Veterans' Appeals after the Board first makes a final decision in the case shall file a copy of any fee agreement between them with the Board at such time as may be specified by the Board. The Board, upon its own motion or the request of either party, may review such a fee agreement and may order a reduction in the fee called for in the agreement if the Board finds that the fee is excessive or unreasonable. A finding or order of the Board under the preceding sentence may be reviewed by the United States Court of Appeals for Veterans Claims under section 7263(d) of this title.

(3) A reasonable fee may be charged or paid in connection with any proceeding before the Department in a case arising out of a loan made, guaranteed, or insured under chapter 37 of this title. A person who charges a fee under this paragraph shall enter into a written agreement with the person represented and shall file a copy of the fee agreement with the Secretary at such time, and in such manner, as may be specified by the Secretary.

(d) (1) When a claimant and an attorney have entered into a fee agreement described in paragraph (2) of this subsection, the total fee payable to the attorney may not exceed 20 percent of the total amount of any past-due benefits awarded on the basis of the claim.

(2) (A) A fee agreement referred to in paragraph (1) is one under which the total amount of the fee payable to the attorney -

- (i) is to be paid to the attorney by the Secretary directly from any past-due benefits awarded on the basis of the claim; and
- (ii) is contingent on whether or not the matter is resolved in a manner favorable to the claimant.

(B) For purposes of subparagraph (A) of this paragraph, a claim shall be considered to have been resolved in a manner favorable to the claimant if all or any part of the relief sought is granted.

(3) To the extent that past-due benefits are awarded in any proceeding before the Secretary, the Board of Veterans' Appeals, or the United States Court of Appeals for Veterans Claims, the Secretary may direct that payment of any attorneys' fee under a fee arrangement described in paragraph (1) of this subsection be made out of such past-due benefits. In no event may the Secretary withhold for the purpose of such payment any portion of benefits payable for a period after the date of the final decision of the Secretary, the Board of Veterans' Appeals, or Court of Appeals for Veterans Claims making (or ordering the making of) the award.

-SOURCE-

(Pub. L. 85-857, Sept. 2, 1958, 72 Stat. 1238, Sec. 3404; Pub. L.

99-576, title VII, Sec. 701(80), Oct. 28, 1986, 100 Stat. 3298; Pub. L. 100-687, div. A, title I, Sec. 104(a), Nov. 18, 1988, 102 Stat. 4108; renumbered Sec. 5904 and amended Pub. L. 102-40, title IV, Sec. 402(b)(1), (d)(1), May 7, 1991, 105 Stat. 238, 239; Pub. L. 102-83, Sec. 4(a)(1), (3), (4), (b)(1), (2)(E), Aug. 6, 1991, 105 Stat. 403-405; Pub. L. 102-405, title III, Sec. 303(a), Oct. 9, 1992, 106 Stat. 1985; Pub. L. 103-446, title V, Sec. 504(a), Nov. 2, 1994, 108 Stat. 4663; Pub. L. 105-368, title V, Sec. 512(a)(1), Nov. 11, 1998, 112 Stat. 3341.)

-MISC1-

AMENDMENTS

1998 - Subsecs. (c)(2), (d)(3). Pub. L. 105-368 substituted "Court of Appeals for Veterans Claims" for "Court of Veterans Appeals" wherever appearing.

1994 - Subsec. (d)(2)(A). Pub. L. 103-446 amended subpar. (A) generally. Prior to amendment, subpar. (A) read as follows: "A fee agreement referred to in paragraph (1) of this subsection is one under which (i) the amount of the fee payable to the attorney is to be paid to the attorney by the Secretary directly from any past-due benefits awarded on the basis of the claim, and (ii) the amount of the fee is contingent on whether or not the matter is resolved in a manner favorable to the claimant."

1992 - Subsec. (c)(1). Pub. L. 102-405, Sec. 303(a)(1), substituted "Except as provided in paragraph (3), in" for "In".

Subsec. (c)(3). Pub. L. 102-405, Sec. 303(a)(2), added par. (3).

1991 - Pub. L. 102-40, Sec. 402(b)(1), renumbered section 3404 of this title as this section.

Subsec. (a). Pub. L. 102-83, Sec. 4(b)(1), (2)(E), substituted "Secretary" for "Administrator" in two places.

Pub. L. 102-83, Sec. 4(a)(1), substituted "administered by the Secretary" for "administered by the Veterans' Administration".

Subsec. (b). Pub. L. 102-83, Sec. 4(b)(1), (2)(E), substituted "Secretary" for "Administrator" in two places in introductory provisions.

Pub. L. 102-83, Sec. 4(a)(3), (4), substituted "Department" for "Veterans' Administration" in introductory provisions and in par. (4).

Pub. L. 102-83, Sec. 4(a)(1), substituted "administered by the Secretary" for "administered by the Veterans' Administration" in par. (4).

Subsec. (c)(1). Pub. L. 102-83, Sec. 4(a)(3), (4), substituted "Department" for "Veterans' Administration".

Pub. L. 102-83, Sec. 4(a)(1), substituted "administered by the Secretary" for "administered by the Veterans' Administration".

Subsec. (c)(2). Pub. L. 102-83, Sec. 4(a)(3), (4), substituted "Department" for "Veterans' Administration".

Pub. L. 102-40, Sec. 402(d)(1), substituted "7263(d)" for "4063(d)".

Subsec. (d)(2)(A), (3). Pub. L. 102-83, Sec. 4(b)(1), (2)(E), substituted "Secretary" for "Administrator" wherever appearing.

1988 - Subsecs. (c), (d). Pub. L. 100-687 added subsecs. (c) and (d) and struck out former subsec. (c) which read as follows: "The Administrator shall determine and pay fees to agents or attorneys recognized under this section in allowed claims for monetary benefits under laws administered by the Veterans' Administration. Such fees -

"(1) shall be determined and paid as prescribed by the Administrator;

"(2) shall not exceed \$10 with respect to any one claim; and

"(3) shall be deducted from monetary benefits claimed and allowed."

1986 - Subsec. (b). Pub. L. 99-576 substituted "the Administrator" for "he" in introductory text.

EFFECTIVE DATE OF 1998 AMENDMENT

Amendment by Pub. L. 105-368 effective on first day of first month beginning more than 90 days after Nov. 11, 1998, see section 513 of Pub. L. 105-368, set out as a note under section 7251 of this title.

EFFECTIVE DATE OF 1994 AMENDMENT

Section 504(b) of Pub. L. 103-446 provided that: "The amendment made by subsection (a) [amending this section] shall apply with respect to fee agreements entered into on or after the date of the enactment of this Act [Nov. 2, 1994]."

EFFECTIVE DATE OF 1992 AMENDMENT

Section 303(b) of Pub. L. 102-405 provided that: "Paragraph (3) of section 5904(c) of title 38, United States Code, as added by subsection (a), shall apply with respect to services of agents and attorneys provided after the date of the enactment of this Act [Oct. 9, 1992]."

EFFECTIVE DATE OF 1988 AMENDMENT

Amendment by Pub. L. 100-687 effective Sept. 1, 1989, see section 401(a) of Pub. L. 100-687, set out as an Effective Date note under section 7251 of this title.

FEE AGREEMENTS

Subsec. (d) of this section not to prevent award of fees and expenses under section 2412(d) of Title 28, Judiciary and Judicial Procedure, but subsec. (d) of this section inapplicable to such award where fees for the same work are received under both sections and claimant's attorney refunds to claimant amount of smaller fee, see section 506(c) of Pub. L. 102-572, set out as a note under section 2412 of Title 28.

APPLICABILITY TO ATTORNEYS FEES

Section 403 of Pub. L. 100-687, which provided that the amendment to subsec. (c) of this section by section 104(a) of Pub. L. 100-687 applied only to services of agents and attorneys in cases in which a notice of disagreement was filed with the Department of Veterans Affairs on or after Nov. 18, 1988, was repealed by Pub. L. 107-103, title VI, Sec. 603(b), Dec. 27, 2001, 115 Stat. 999.

[Repeal of section 403 of Pub. L. 100-687, formerly set out above, applicable to any appeal filed with the United States Court of Appeals for Veterans Claims on or after Dec. 27, 2001, or before that date but in which a final decision has not been made under section 7291 of this title as of that date, see section 603(d) of Pub. L. 107-103, set out as a note under section 7251 of this title.]

-End-

-CITE-

38 USC Sec. 5905

01/03/05

-EXPCITE-

TITLE 38 - VETERANS' BENEFITS

PART IV - GENERAL ADMINISTRATIVE PROVISIONS
CHAPTER 59 - AGENTS AND ATTORNEYS

-HEAD-

Sec. 5905. Penalty for certain acts

-STATUTE-

Whoever (1) directly or indirectly solicits, contracts for, charges, or receives, or attempts to solicit, contract for, charge, or receive, any fee or compensation except as provided in sections 5904 or 1984 of this title, or (2) wrongfully withholds from any claimant or beneficiary any part of a benefit or claim allowed and due to the claimant or beneficiary, shall be fined as provided in title 18, or imprisoned not more than one year, or both.

-SOURCE-

(Pub. L. 85-857, Sept. 2, 1958, 72 Stat. 1239, Sec. 3405; Pub. L. 99-576, title VII, Sec. 701(81), Oct. 28, 1986, 100 Stat. 3298; Pub. L. 100-687, div. A, title I, Sec. 104(b), Nov. 18, 1988, 102 Stat. 4109; renumbered Sec. 5905 and amended Pub. L. 102-40, title IV, Sec. 402(b)(1), (d)(1), May 7, 1991, 105 Stat. 238, 239; Pub. L. 102-83, Sec. 5(c)(1), Aug. 6, 1991, 105 Stat. 406.)

-MISC1-

AMENDMENTS

1991 - Pub. L. 102-40 renumbered section 3405 of this title as this section and substituted "5904" for "3404".

Pub. L. 102-83 substituted "1984" for "784".

1988 - Pub. L. 100-687 substituted "shall be fined as provided in title 18, or imprisoned not more than one year, or both" for "shall be fined not more than \$500 or imprisoned at hard labor for not more than two years, or both".

1986 - Pub. L. 99-576 substituted "to the claimant or beneficiary" for "him".

EFFECTIVE DATE OF 1988 AMENDMENT

Amendment by Pub. L. 100-687 effective Sept. 1, 1989, see section 401(a) of Pub. L. 100-687, set out as an Effective Date note under section 7251 of this title.

-End-



DEPARTMENT OF VETERANS AFFAIRS
Office of the General Counsel
Washington DC 20420

May 24, 2004

In Reply Refer To: 022

The Honorable Lane Evans
Ranking Democratic Member
Committee on Veterans' Affairs
U.S. House of Representatives
Washington, DC 20515

Dear Congressman Evans:

I am responding to your April 7, 2004, letter to the Secretary of Veterans Affairs, which asks for our interpretation of 38 U.S.C. § 5904 governing representation of veterans before the Department of Veterans Affairs (VA). Specifically, you ask whether section 5904 permits attorneys to charge veterans for consultation that occurs prior to the filing of a claim for VA benefits. We conclude that attorneys may charge veterans for pre-filing consultation without violating the attorney fees limitation contained in section 5904.

You expressed concern that the criminal penalties for violating section 5904, see 38 U.S.C. § 5905, might discourage attorneys from advising elderly and disabled veterans about their eligibility for certain Federal benefits. To illustrate your concern, you listed two examples of situations where attorneys might be unsure of their obligations under section 5904. These examples are essentially identical in that they both involve elderly veterans who obtain general legal advice concerning eligibility for Federal benefits, including VA benefits. Though not stated in your examples, we assume that services rendered by attorneys in such situations would generally include review of records, research, counseling, and any other assistance that a potential VA claimant might need short of actually preparing and presenting a specific claim for benefits. We are not aware of anything in the law governing representation of veterans that would prohibit attorneys from charging fees for this kind of pre-filing consultation.

Section 5904(a) authorizes the Secretary to "recognize any individual as an . . . attorney for the preparation, presentation, and prosecution of claims" for VA benefits. However, an attorney may not charge a fee "in connection with a proceeding before the Department . . . for . . . services provided before the date on which the Board of Veterans' Appeals first makes a final decision in the case." 38 U.S.C. § 5904(c)(1). Attorneys may charge a fee for services provided after the Board makes its first final decision only if the veteran retains the attorney within a year of the Board's decision. *Id.* Your letter suggests that the phrase "in connection with a proceeding before the Department" in section 5904(c)(1) means that, in addition to pre-filing consultation, fees may be charged for preparing and presenting a claim for VA benefits. We respectfully

2.

The Honorable Lane Evans

disagree. When read together, subsections (a) and (c)(1) of section 5904 indicate that the "preparation" and "presentation" of a claim are among the "services" that attorneys may provide to claimants "in connection with" a VA proceeding. In our view, section 5904 as a whole defines the scope of attorney services for which fees are prohibited prior to a final Board decision on the claim.

To the extent that there is any ambiguity about whether claim preparation and presentation are included in the prohibition against attorney fees, VA has resolved that ambiguity in regulations that govern representation of VA claimants. The regulations define a VA "claimant" as "a person who has filed or has expressed to a representative, agent, or attorney an intention to file a written application for determination of entitlement to benefits provided under title 38, United States Code, and implementing directives." 38 C.F.R. § 14.627(g). An attorney may be accredited to represent a veteran in connection with a claim for VA benefits upon submission of a power of attorney or signed writing on the attorney's letterhead stating that the claimant has authorized the representation. 38 C.F.R. §§ 14.629(c), 14.631(a) and (b). Accredited attorneys may charge a fee for their services "only" if the Board has promulgated a final decision on the claim and the claimant retained the attorney within one year of the Board's decision. 38 C.F.R. § 20.609(c)(1). Finally, the regulations provide that VA shall cancel an attorney's accreditation if the VA General Counsel finds that the attorney demanded or accepted "unlawful compensation for preparing, presenting, prosecuting, or advising or consulting, concerning a claim." 38 C.F.R. § 14.633(c)(3). In our view, these regulations adequately inform attorneys of their obligations under current law. Under no circumstances may attorneys charge veterans for preparing and presenting claims for VA benefits if those services are provided prior to a final Board decision on the claim.

Legislative history supports our interpretation of this statutory limitation upon attorney fees. Before 1988, the law did not prohibit the payment of nominal fees to attorneys for preparing and filing claims for VA benefits. See 38 U.S.C. § 3404(c) (1979) (authorizing maximum fees of ten dollars "for the preparation, presentation, and prosecution of claims"); 38 U.S.C. § 551 (1942) (authorizing maximum attorney fees of ten dollars "as may be required in the preparation and execution of necessary papers"). However, section 104(a) of the Veterans' Judicial Review Act (VJRA), Pub. L. No. 100-687, Div. A, § 104(a), 102 Stat. 4105, 4108 (1988), repealed the statutory ten-dollar fees afforded to attorneys for claim-preparation services and enacted the fee provisions in current section 5904. In its summary of a bill that preceded the enactment of the VJRA, the House Committee on Veterans' Affairs stated that the attorney fees provision "would prohibit attorneys from charging any fee in connection with an application for VA benefits." H.R. Rep. No. 100-963, at 5 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5782, 5786. The Committee went on to report that the primary purpose for the historical limitation of attorney fees was "to protect the interests of veterans from the perceived threat that agents or attorneys would charge excessive fees for their services, which essentially required only the preparation and presentation of an

3.


The Honorable Lane Evans

application for benefits." *Id.* at 16, *reprinted in* 1988 U.S.C.C.A.N. at 5798. Another purpose was to maintain the "informal and non-adversarial" structure of VA's claims adjudication process. *Id.* The Committee intended that the legislation would maintain that informal structure by prohibiting attorneys from charging fees for services rendered before a VA regional office issues a statement of the case concerning a challenged decision. *Id.* at 26, *reprinted in* 1988 U.S.C.C.A.N. at 5808. To remove any doubt concerning its intentions, the Committee concluded its analysis by emphasizing that the attorney fees provisions provide "explicitly that no fees may be charged for any services rendered prior to the issuance of the statement of the case." *Id.* at 29, *reprinted in* 1988 U.S.C.C.A.N. at 5811. Prior to enactment of the VJRA, the Senate and House Committees on Veterans' Affairs entered into a compromise agreement, which expanded the fee limitation to include all services rendered prior to the first final Board decision on a claim. See Explanatory Statement on Compromise Agreement on Division A, 134 CONG. REC. S16650 (daily ed. Oct. 18, 1988), *reprinted in* 1988 U.S.C.C.A.N. 5834, 5836-38. See also *In re Smith*, 1 Vet. App. 492, 496-511 (1991) (Steinberg J. concurring) (analyzing the legislative history of the VJRA attorney fees provisions).

The attorney in your first example is distinguished only by the fact that he "assists the veteran in completing an application for pension." To the extent that, after consultation, the veteran expressed to the attorney an intention to file a specific claim for VA benefits and the attorney charged the veteran for preparing the claim, the attorney did so in violation of section 5904. For that attorney, the better practice would have been to charge the veteran for the pre-filing consultation and simply prepare the claim on a *pro bono* basis.

I hope this information is helpful to you. Please let me know if I can be of further assistance.

Sincerely yours,



Tim S. McClain
General Counsel

United States Court of Appeals for the Federal Circuit

02-7395

CARPENTER, CHARTERED,

Petitioner,

v.

SECRETARY OF VETERANS AFFAIRS,

Respondent.

Alan M. Grayson, Grayson, Kubli & Hoffman, P.C., of McLean, Virginia, argued for petitioner. On the brief were Ira E. Hoffman, and James A. McMillan.

Kyle E. Chadwick, Trial Attorney, Commercial Litigation Branch, Civil Division, Department of Justice, of Washington, DC, argued for respondent. On the brief were David M. Cohen, Director; Franklin E. White, Jr., Assistant Director; and William C. Peachey, Trial Attorney. Of counsel on the brief was Michael J. Timinski, Staff Attorney, Department of Veterans Affairs, of Washington, DC.

Jeffrey Wood, of York, Pennsylvania, for amicus curiae National Organization of Veterans' Advocates.

Appealed from: Department of Veterans Affairs

United States Court of Appeals for the Federal Circuit

02-7395

CARPENTER, CHARTERED,

Petitioner,

v.

SECRETARY OF VETERANS AFFAIRS,

Respondent.

DECIDED: September 11, 2003

Before RADER, BRYSON, and GAJARSA, Circuit Judges.

BRYSON, Circuit Judge.

Since the Civil War era, Congress has limited the fees attorneys may charge for representing persons who apply for veterans' benefits. See Act of July 14, 1862, §§ 6-7, 12 Stat. 566, 568. Those limitations were originally implemented "to protect the veteran from extortion or improvident bargains with unscrupulous lawyers" who overcharged for work that consisted mainly of filing uncomplicated forms for pension benefits on behalf of veterans with limited literacy skills. Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 359-62 (1985) (Stevens, J., dissenting).

For more than 120 years, attorney fees for assisting veterans and their survivors in prosecuting benefit claims were capped at \$10. See 38 U.S.C. 3404(c) (1988); Walters, 473 U.S. at 308, 319. Congress purposely limited the role of lawyers in the veterans' benefits process in

order to protect claimants' benefits from being diverted to lawyers and to avoid making the claims process adversarial in nature, particularly in light of the highly effective representation provided for free by veterans' service organizations. Walters, 473 U.S. at 322; S. Rep. No. 97-466, at 49 (1982).

In 1988, as part of the statute that provided for judicial review of administrative decisions on veterans' claims, Congress repealed the \$10 fee cap and allowed attorneys to charge reasonable fees to represent claimants, but only under certain circumstances. See Veterans' Judicial Review Act, Pub. L. No. 100-687, 102 Stat. 4105 (1988). The 1988 Act permitted attorneys to charge fees for services rendered after a claim was decided by a regional office of the Department of Veterans Affairs ("DVA") and the Board of Veterans' Appeals ("BVA") issued a final decision on the claim. For services rendered prior to that point in the process, the Act prohibited attorneys from charging claimants for representation. See 38 U.S.C. § 5904(c)(1). As was the case before the 1988 Act, however, the DVA continued to permit attorneys and non-attorney agents to receive fees or salaries from veterans' service organizations or other disinterested third parties for prosecuting claims, even in circumstances in which an attorney could not receive a fee from the claimant. See 38 C.F.R. § 20.609(d) (1992). The regulation addressing disinterested third-party fee payers provides that "[a]n attorney-at-law or agent may receive a fee or salary from an organization, governmental entity, or other disinterested third party for representation of a claimant or appellant even though the conditions set forth in paragraph (c) [regarding fees for services after a final decision by the BVA] have not been met." Id.

In December 1997 the DVA proposed to amend the disinterested third-party payer regulation. Board of Veterans' Appeals: Rules of Practice—Attorney Fee

Matters, 62 Fed. Reg. 64,790 (Dec. 9, 1997). After receiving public comment on its proposed amendment, the DVA published the final version of the rule on May 23, 2002. Board of Veterans' Appeals: Rules of Practice—Attorney Fee Matters, 67 Fed. Reg. 36,102 (May 23, 2002). The new regulation continued to permit an attorney or agent to receive a salary or fee from a disinterested third party, but it contained three additional provisions with respect to the payment of fees from third parties for work done prior to the final decision of the BVA. First, it prohibited an attorney or agent from charging a fee contingent, in whole or in part, upon whether the matter is resolved favorably to the claimant or appellant. Second, it established a rebuttable presumption that the spouse, child, or parent of the claimant, or a person residing with the claimant, is not a disinterested third party. Third, it required that all agreements for payment by a third party be in writing, be filed with the Board, and include a certification by the attorney or agent that “no agreement, oral or otherwise, exists under which the claimant or appellant will provide anything of value to the third-party payer . . . in return for payment of [the attorney’s] fee or salary, including, but not limited to, reimbursement of any fees paid.” 38 C.F.R. § 20.609(d)(2); 67 Fed. Reg. at 36,104.

Carpenter, Chartered (“Carpenter”), a law firm engaged in representing veterans’ benefits claimants, has petitioned this court under 38 U.S.C. § 502 for judicial review of the new regulation. Carpenter asserts that the new regulation is invalid because it is unauthorized by statute, because it is arbitrary and capricious, and because it was issued in violation of the Regulatory Flexibility Act, 5 U.S.C. § 604.

Congress granted the Secretary of Veterans Affairs authority “to prescribe all rules and regulations which are necessary or appropriate to carry out the laws administered by the Department and are consistent with those laws.” 38 U.S.C. § 501(a). Based on that authority, the DVA proposed the challenged amendments to the third-party payer regulation in order to “establish safeguards” relating to the statutory restriction on the payment of attorney fees for services rendered before the BVA’s first final decision on an issue. See 62 Fed. Reg. at 64,791.

Carpenter argues that the statutory prohibition on the payment of fees prior to the first final decision of the BVA, 38 U.S.C. § 5904(c), applies to fees paid by claimants, not by third parties, and that the DVA’s regulation governing third-party fee payments addresses conduct outside the scope of the statute and is thus ultra vires. Although the language of section 5904(c) is broad, it has been construed as applying only to fee payments made by recipients of veteran benefits, and not to payments by disinterested fee payers that are not derived, directly or indirectly, from the claimant or intended beneficiary. See United States v. Welty, 2 F.2d 562 (6th Cir. 1924); U.S. Dep’t of Justice, Office of Legal Counsel, Legality of State Payments to Attorneys Representing Veterans, 10 Op. Off. Legal Counsel 1, 3 n.10 (1986). Nonetheless, the fact that section 5904(c) does not prohibit payments by disinterested fee payers does not mean that the DVA may not regulate payments by such fee payers.

The Supreme Court has held that when Congress grants an agency the authority to make such rules and regulations as may be necessary to carry out the provisions of a particular statute, a regulation promulgated pursuant to that authority will be upheld as long as it is “reasonably related to the purposes of the enabling legislation.” Mourning v. Family Publ’ns Serv., Inc., 411 U.S. 356, 369 (1973); Thorpe v. Hous. Auth. of the City of Durham, 393 U.S. 268, 280-81 (1969). Moreover, a regulation is reasonably related to the purposes of the legislation to which it

relates if the regulation serves to prevent circumvention of the statute and is not inconsistent with the statutory provisions. See Thomas Int'l, Ltd. v. United States, 773 F.2d 300, 304-05 (Fed. Cir. 1985) (upholding a Treasury Department regulation that guards against evasion of a statutory requirement and is not inconsistent with the statute); Clifton v. Fed. Election Comm'n, 114 F.3d 1309, 1312 (1st Cir. 1997) (“Normally an agency with rulemaking power has a measure of latitude where it is dealing with the regulated entity . . . and where the rule is reasonably designed to achieve the statute’s goal Agencies often are allowed through rulemaking to regulate beyond the express substantive directives of the statute, so long as the statute is not contradicted.”); Ohio v. U.S. Dep’t of the Interior, 880 F.2d 432, 473-74 (D.C. Cir. 1989) (agency’s promulgation of accounting and planning requirements “is a perfectly sensible means of ensuring that state trustees obey the statutory command”); Mattes v. United States, 721 F.2d 1125, 1131 (7th Cir. 1983) (upholding Agriculture Department’s denial of registration to operate a stockyard where such denial was necessary to prevent circumvention of a statutory suspension order); Merged Area X (Educ.) v. Cleland, 604 F.2d 1075, 1080 (6th Cir. 1979) (the regulatory “imposition of uniform criteria [as to the meaning of ‘semester hour’ as applied to institutions of higher learning where attending veterans receive educational benefits] is necessary to prevent circumvention of the [statutory] twelve semester hour limit which would occur if each institution could define ‘semester hour’ as it wished”).

In light of those principles, the DVA is authorized to issue rules governing attorney fee payments by putatively disinterested third-party payers. In particular, the agency is authorized to issue rules governing the conduct of third-party fee payers where those rules are designed to prevent circumvention of the statutory prohibition against attorney fee payments made by the claimant or from funds intended for the benefit of the claimant. That is precisely the basis that

the DVA gave for adopting the 2002 amendments to its disinterested third-party payer regulation. See 67 Fed. Reg. at 36,103 (“[T]hese changes are necessary to help enforce statutory limitations on payment that are being violated. . . . [I]t is our experience that third-party agreements are being used to evade those limitations.”).

Carpenter contends that the 2002 amendments to the disinterested third-party payer regulation are contrary to the statute they purport to implement, 38 U.S.C. § 5904(c), and that the amendments are therefore invalid. While it is true that the statute has been construed not to apply by its terms to third-party fee payers, that does not mean that any regulation of such fee payers is contrary to the statutory policy. Nothing in the statute suggests that Congress intended to immunize third-party fee payers from regulation, and to the extent that third-party payments are used to evade the statutory prohibition against the direct payment of fees from claimants’ assets, the regulation of such third-party fee payments is consistent with the purposes underlying the statute.

Contrary to Carpenter’s contention, this case is quite different from Brown v. Gardner, 513 U.S. 115 (1994). In that case, the Supreme Court struck down a DVA regulation that required a veteran who suffered an injury in the course of treatment at a DVA medical facility to demonstrate that the injury was the result of fault on the part of the treating personnel or an accident during treatment. The Court held that the applicable statute, 38 U.S.C. § 1151, required only that the injury occur as the result of medical treatment or rehabilitation, not as the result of the veteran’s own willful misconduct, and that the statute did not admit of a construction adding a further requirement that the injury be the product of fault or accident. 513 U.S. at 120. In this case, by contrast, there is no inconsistency between the statute, which prohibits fee payments by

claimants, and the regulation, which seeks to prevent circumvention of the statutory prohibition through the use of third-party fee payers. Thus, we reject Carpenter's broad argument that the DVA lacks statutory authority to regulate disinterested fee payers in any way, or that the DVA's effort to regulate third-party fee payers is contrary to section 5904(c).

II

We next turn to the question whether the 2002 amendments constituted reasonable means to guard against the circumvention of the statutory policies. The DVA stated that the 2002 amendments to the disinterested third-party payer rule were needed "to help enforce statutory limitations on payment that are being violated." 67 Fed. Reg. at 36,103. Based on its experience, the agency found that "the majority of third-party [attorney fee] agreements are rather blatant attempts to avoid the restriction, imposed by the Veterans' Judicial Review Act . . . that attorneys may not charge veterans for services which are rendered before the first final Board decision on an issue." Carpenter argues that those assertions are unsupported by reason or by the rulemaking record.

Carpenter first contends that there is no need to regulate third-party payers in order to prevent circumvention of statutory policy. The DVA, however, pointed to circumstances that justified an inference that at least some third-party fees were being paid out of funds that were intended for the benefit of the claimant. For example, the agency cited evidence that in many cases involving contingent fee arrangements, the third-party payer had the same last name as the claimant or was identified as being a member of the claimant's family. While that evidence is not conclusive proof that the third parties in question were not disinterested, it is reasonable to infer that in at least some such cases attorneys' fees were paid from assets to which the third parties and the claimants both had access. Moreover, it is unnecessary for an agency to prove

that circumvention has occurred in the past in order sustain an anti-circumvention regulation as reasonable; a regulation can be justified by a reasonable expectation that it will prevent circumvention of statutory policy in the future. See FCC v. Nat'l Citizens Comm. for Broad., 436 U.S. 775, 813-14 (1978); Mortgage Investors Corp. v. Gober, 220 F.3d 1375, 1380 (Fed. Cir. 2000). We agree with the DVA that permitting third-party payers to pay attorney fees in cases in which claimants are barred by statute from making such payments presents the risk that third-party payers may be used to circumvent the statutory prohibition. Accordingly, it was reasonable for the agency to attempt to prohibit such circumvention.

Carpenter challenges all three of the amendments to the disinterested third-party payer regulation: the requirement that attorneys certify that third-party fees do not come from the claimant; the presumption that a claimant's close family members are not disinterested; and the prohibition against third-party contingent fee agreements. We are unpersuaded by the challenges to each of those provisions.

First, it is hard to quarrel with the regulatory requirement that attorneys who enter into third-party fee agreements certify that the claimant has not agreed to reimburse or otherwise compensate the third party for paying the attorney's fee in connection with the claim. That requirement directly enforces the statutory policy against having claimants pay attorney fees for work done before the first final BVA decision, and it is therefore a manifestly reasonable means of avoiding circumvention.

Similarly, it is reasonable for the agency to define what constitutes a disinterested third party. Although Carpenter argues that the agency did not adduce evidence to support its conclusion that there should be a presumption of interest with respect to a spouse, child, or parent of the claimant, or a person residing with the claimant, the characterization of such

persons as unlikely to be disinterested is reasonable on its face and is not the kind of characterization that needs evidentiary support. As the DVA stated in the rulemaking proceedings, “persons in such relationships usually have some financial or other interest in the success of the claim and are therefore unlikely to be disinterested.” The regulation permits the presumption of interest to be rebutted in the case of such persons. However, the likelihood that such a person is not acting independently of the claimant and that a contingent fee payment by such a person will ultimately be derived from assets that belong to the claimant is sufficiently great that a presumption of interest is permissible even in the absence of direct evidentiary support. Accordingly, we cannot agree with Carpenter’s contention that the basis for establishing a rebuttable presumption of interest is irrational.

Carpenter’s principal challenge is to the reasonableness of the DVA’s prohibition of contingent fee agreements with disinterested third parties for work done prior to a final BVA decision on the issue. The DVA explained that in its experience contingent fee agreements have been used to evade the statutory prohibition on claimant-paid attorney fees. The DVA outlined its experience with the use of contingent fees in connection with third-party fee payers as follows:

In dealing with [the third-party fee payer] exception over the years, we have reviewed fee agreements that list individuals as “disinterested third parties” who appear to be no more than “straw men,” i.e., nominal fee payers who really serve as a mere conduit for a prohibited payment by a claimant or appellant. Typically, such “disinterested third parties” will agree to pay a fee equal to some percentage of the amount of any past-due benefits awarded the claimant, contingent upon a successful outcome. Indeed, some contracts we have

reviewed call for payment of a percentage of the actual past-due benefits by these third parties, a legally impossible feat because of the nonassignability of veterans' benefits under 38 U.S.C. 5301.

62 Fed. Reg. at 64,792. The DVA further noted that its experience has shown that contingency fee arrangements “set the stage for a transfer from the veteran to the third party to the attorney.”

Id.

Carpenter argues that the evidence of record does not show that third-party contingent fee agreements have been used to contravene the statutory restrictions. We disagree. Apart from the agency's statements as to its experience with such agreements, there was evidence in the rulemaking record from which the agency could reasonably conclude that third-party contingent fee agreements were being used to circumvent the statute.

First, the agency analyzed a number of third-party fee agreements and discovered that the vast majority of those agreements in which the third party had either the same last name or an identified familial relationship with the claimant were contingent fee agreements. That evidence suggests that many third-party fee payers who used contingent fee agreements were not truly disinterested, and thus that the use of contingent fees in that setting increased the likelihood that the fees would be paid from funds that would otherwise be available to the claimant.

Moreover, several of the comments that the DVA received regarding the proposed amendments to the third-party payer regulation, although intended to be critical, actually buttressed the agency's showing that it had a legitimate concern about the abusive use of contingent fee agreements by third-party fee payers. For example, one commenter suggested that the DVA abandon the restrictions on third-party contingency fee agreements because

“people will violate the law anyway,” which clearly suggests that third-party contingency fee agreements were being used to circumvent the statutory prohibition.

Another commenter stated that without a contingency fee agreement, “I charge a third party a fee of \$10,000.00 to handle a case with potentially large back benefits. The case is lost. The third party now hounds the veteran for his money. (He is not supposed to, but this is the real world!)” Implicit in that statement is the recognition that the contingent fee arrangement with a third party is simply an indirect mechanism for obtaining a fee from funds that would otherwise go to the claimant, since in the commenter’s view such third parties do not expect to shoulder the burden of the fee.

Still another commenter suggested that without third-party contingent agreements claimants would not be able to afford attorneys. That comment, too, indicates that it is the claimants, not disinterested third parties, who are actually paying the attorneys. If a disinterested third party were paying the attorney’s fee, the represented claimant’s ability to pay would be irrelevant.

The problem addressed by the amendments to the disinterested third-party payer regulation is not a new one. More than 75 years ago, the Sixth Circuit considered the intent of Congress in limiting attorneys’ fees for services rendered in obtaining veterans benefits. See Welty v. United States, 2 F.2d 562 (6th Cir. 1924). The court determined that a third party (in that case the claimant’s father), “desirous of performing a charitable act” by paying an attorney on behalf the veteran (his son) would not violate the predecessor of section 5904(c), as long as the fee arrangement did not in any way “affect the property interests of the applicant himself.” Id. at 564. However, the court noted that if the fee agreement between the third party and the attorney “were more or less of a subterfuge intended to hide [an] actual transaction” involving

payment from the benefit award, the statute would be violated. Id. The Welty case illustrates the kind of controversy that prompted the DVA regulations and the risk of abuse that the amendments were intended to address.

In light of the evidence in the rulemaking record and the analysis provided by the agency in the proposed rulemaking and in connection with the promulgation of the final rule, we conclude that the 2002 amendments to the disinterested third-party payer rule are “rational, based on consideration of the relevant factors, and within the scope of the authority delegated to the agency by the statute.” Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42 (1983). While the agency might rationally have drawn different conclusions about the seriousness of the problem addressed or the suitability of the particular mechanisms chosen to address the problem, we cannot say that the agency was unreasonable in concluding that third-party fee agreements were being used, or were likely to be used, to circumvent the statutory prohibition on the payment of attorney fees by claimants, nor can we conclude that the method chosen by the agency to address that perceived problem was irrational.

Carpenter argues that restrictions on contingency agreements will impair the ability of claimants to be represented by counsel and will discourage legitimate claims. That argument, however, is addressed more to the prohibition against paid representation than to the regulatory provisions governing third-party payers. When it enacted the 1988 legislation, Congress was aware of the arguments that claimants should have more ready access to counsel during the early phases of the claims process, and Congress rejected those arguments. Given Congress’s determination as to that issue, the 2002 amendments to the agency’s disinterested third-party payer regulation cannot be deemed arbitrary and capricious, and we therefore uphold them.

The Regulatory Flexibility Act requires an agency to prepare and publish an analysis of the impact of proposed rules on small entities. 5 U.S.C. §§ 603, 604. An agency need not publish such an analysis, however, if the head of the agency certifies that the rule will not “have a significant economic impact on a substantial number of small entities.” 5 U.S.C. § 605(b). That certification must be published in the Federal Register and be accompanied by “a statement providing the factual basis for such certification.” *Id.* In lieu of a regulatory flexibility analysis, the Secretary of Veterans Affairs certified that the disinterested third-party payer rules would “affect only the processing of claims by VA and will not affect small businesses.” 62 Fed. Reg. at 64,792; 67 Fed. Reg. at 36,104.

Carpenter argues that the Secretary’s certification was invalid because the DVA failed to conduct a regulatory flexibility analysis and ignored the facts regarding the impact of the new rule on small entities. The DVA, however, viewed the 2002 amendments not as prohibiting fee arrangements that had previously been permissible, but rather as providing a means of enforcing a statutory prohibition that was already in place against the use of claimants’ assets to pay attorney fees for work done prior to the final decision of the BVA on an issue. Thus, because the effect of the amendments would be to prevent fee arrangements that were already unlawful under current statutory standards, they would not have a substantial effect on the legitimate activities of any small entities.

We uphold the Secretary’s conclusion that the amendments are not likely to have a significant effect on a substantial number of small businesses. To the extent that the new regulation imposes reporting and certification requirements, the effect on small businesses is minimal. To the extent that the new regulation adopts a presumption that close relatives of the claimant are not disinterested third parties, it merely provides a mechanism for enforcing a principle that was already implicit in the statutory prohibition against the payment of attorney fees from a claimant’s assets. Finally, to the extent that the new regulation prohibits putatively disinterested third parties from entering contingent fee agreements with attorneys, it was reasonable for the Secretary to conclude that that prohibition would not have a significant economic effect on small businesses because—as the Department explained in its written response to comments on the regulations—there is no legitimate reason for a truly disinterested third party to enter into a contingent fee arrangement. *See* 67 Fed. Reg. at 36,103 (“By definition, a disinterested third party will receive no benefit from any award to the veteran, so that the outcome can generate no funds with which to pay the attorney.”).

Even assuming that the disinterested third-party payer regulations will have an effect on the legitimate economic activities of some lawyers who represent veterans’ benefit claimants, the record does not support Carpenter’s contention that a substantial number of small entities will be affected by the new regulation. The record does not establish that a large number of attorneys regularly have contingent fee agreements with putatively disinterested third parties. Moreover, as noted, the continued availability of non-contingency fee agreements with disinterested third parties limits the economic impact that the 2002 amendments may have even on those attorneys who have regularly entered into contingent fee arrangements with third parties in the past. Accordingly, in view of the record as a whole, we cannot say that the Secretary abused his discretion when he certified that the amendments would not have a significant impact on a substantial number of small entities. *See* S. Rep. No. 96-878, at 14 (1980), *reprinted in* 1980 U.S.C.C.A.N. 2801 (stating Committee’s intention that an agency’s certification that a rule will not adversely affect small businesses, “if made in good faith and based on sound evidence, shall be granted great deference by the courts”). We therefore conclude that the challenged regulation

was within the DVA's authority to promulgate and was not issued in violation of the Regulatory Flexibility Act.

PETITION DENIED.