



subject card

September 13, 1982

B-208999

The Honorable J. Paul McGrath
Assistant Attorney General
Civil Division
Department of Justice

RE: Paralyzed Veterans of America, et al. v. [REDACTED]
C.D. Cal., Civil No. 79-1979-WPG, and [REDACTED]
et al. v. United States, C.D. Cal., Civil No.
80-5368-WPG

Dear Mr. McGrath:

The purpose of this letter is to confirm discussions between members of our respective staffs to the effect that we have no legal authority to certify a judgment against the United States for payment where the Justice Department has made a determination to file an appeal. The issue arises in the two subject cases in the form of interim awards of attorney's fees by the district court.

Our authority to certify judgments for payment is governed by statute. First, 28 U.S.C. § 2414 provides in part:

"[P]ayment of final judgments rendered by a district court against the United States shall be made on settlements by the General Accounting Office. * * *

"Whenever the Attorney General determines that no appeal shall be taken from a judgment or that no further review will be sought from a decision affirming the same, he shall so certify and the judgment shall be deemed final." (Emphasis added.)

A similar requirement exists for judgments of the Court of Claims in 28 U.S.C. § 2517. In addition, most judgments against the United States are paid, upon certification by the General Accounting Office, from the permanent indefinite appropriation established by section 1302 of the Supplemental Appropriation Act of 1957, as amended, 31 U.S.C. § 724a, which provides:

"There are appropriated, out of any money in the Treasury not otherwise appropriated, such sums as may be necessary for the payment, not otherwise provided for, as certified by the Comptroller General, of final judgments, awards, and compromise settlements, which are payable in accordance with the terms of section 2414 * * * of Title 28 * * *."
(Emphasis added.)

Since an award of attorney's fees made in an order of a district court is a judgment of that court, it is subject to the above-cited statutory provisions.¹

All of the statutes cited explicitly limit their applicability to judgments which are "final." The "final judgment" requirement originated at a time when judgments against the United States could be paid only upon enactment of a specific congressional appropriation. Traditionally, Congress included very specific finality language when making these appropriations. For example, a 1925 appropriation stated that "None of the judgments contained herein shall be paid until the right of appeal shall have expired." Act of March 4, 1925, 43 Stat. 1347, quoted in 4 Comp. Gen. 834, 835 (1925) (Enclosure 1). More recently, the Supplemental Appropriations Act, 1977, Pub. L. No. 95-26, 91 Stat. 61, 96, provided that "no judgment herein appropriated for shall be paid until it shall become final and conclusive against the United States by failure of the parties to appeal or otherwise."²

The purpose of the finality requirement in 28 U.S.C. § 2414 and 31 U.S.C. § 724a is to preserve this concept.

¹ To the extent that attorney's fees are awarded solely under authority of the Equal Access to Justice Act, Pub. L. No. 96-481, title II, the availability of the permanent judgment appropriation is limited by section 207 of that Act. This, however, does not affect the finality requirement as discussed in the text of this letter.

² Although 31 U.S.C. § 724a was enacted in 1956, specific judgment appropriations continued until 1977 because 31 U.S.C. § 724a originally contained a \$100,000 limitation, which was removed in 1977.

The requirement stems from the congressional determination, consistently expressed in legislation over many decades, that the United States should not be required to pay money out of the Treasury pursuant to a judgment or order of a court which is susceptible of being modified or reversed on appeal. Briefly, therefore, a judgment against the United States becomes final for payment purposes when appellate action with respect to it is completed, or when the right to seek further review no longer exists. The finality requirement is discussed in more detail in two unpublished decisions of the Comptroller General, B-129227, December 22, 1960, and B-164766, June 1, 1979 (Enclosures 2 and 3).

In recent years, the practice of making interim awards of attorney's fees, especially in protracted litigation, has become much more common. When a court awards interim fees, the order making that award is treated as a separate judgment. Thus, it is routinely certified for payment regardless of the status of the underlying litigation, as long as the fee order itself is "final" within the context discussed above. See in this connection unpublished decision B-190940, September 21, 1978 (Enclosure 4). It is on this basis that the four previous fee awards in the Paralyzed Veterans case were certified for payment. What distinguishes the fifth and most recent award in Paralyzed Veterans, as well as the award in Williams, is that the Attorney General has determined that the United States will appeal both of those awards (and has, we understand, already filed a notice of appeal from the Williams order). Accordingly, since these awards are not final within the meaning of 28 U.S.C. § 2414 and 31 U.S.C. § 724a, we have no legal authority to certify them for payment at this time.

A further consequence of the finality requirement is that there is no appropriation legally available to make the payment. Article I, sec. 9 of the Constitution provides that no money shall be drawn from the Treasury except pursuant to an appropriation made by law. Courts have stated that, under this provision, no officer of the Government is authorized to pay a debt due from the United States, whether or not reduced to judgment, unless an appropriation has been made for that purpose. Reeside v. Walker, 52 U.S. (11 How) 272, 291 (1850); Hughes Aircraft Co. v. United States, 534 F.2d 889, 906 (Ct. Cl. 1976).

It is clearly within the power of the Congress to place restrictions or conditions on the use of appropriations. The restriction Congress has imposed on the availability of appropriations to pay judgments is that the judgments must be final. Therefore, an order to pay an award which is not final is, in effect, an order to pay money from the Treasury for which there is no lawful appropriation. See also 31 U.S.C. § 628, which restricts appropriations to their intended purposes.

For these reasons, we must conclude that we have no legal authority, nor is there an appropriation legally available, to certify the two subject awards for payment until they become final, either by completion of the appellate action or by loss or expiration of the right to appeal.

Sincerely yours,

Harry R. Van Cleve

Harry R. Van Cleve
Acting General Counsel

Enclosures

COURTS

Judgments, decrees, etc.

Payment

"Final judgment" requirement

COURTS

Judgments, decrees, etc.

Payment

Appropriation chargeable

WORDS AND PHRASES

Final judgment