IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

FLORENCE PETITE,	)	
	)	
Appellant,	)	
	)	
v.	)	Vet. App. No. 19-5815
	)	
DENIS MCDONOUGH,	)	
Secretary of Veterans Affairs,	)	
	)	
Appellee.	)	

APPELLEE'S RESPONSE TO APPELLANT'S APPLICATION FOR ATTORNEY'S FEES AND EXPENSES

ISSUE PRESENTED

Whether the Secretary's position was substantially justified, such that Appellant is not entitled to recover attorney's fees and expenses under 28 U.S.C. § 2412(d)(1)(A).

ISSUES NOT CONTESTED

The Secretary concedes that this Court has jurisdiction over this matter pursuant to 38 U.S.C. § 7261(a)(1) and the Equal Access to Justice Act (EAJA). *See* 28 U.S.C. § 2412(d)(2)(F); 38 U.S.C. § 7261(a)(1). Moreover, Appellant's EAJA application satisfies the jurisdictional requirements of the statute as set out in 28 U.S.C. § 2412(d)(1)(B). The Secretary also concedes that (1) Appellant was a "prevailing party" within the meaning of the statute; (2) no special circumstances exist that would make an award of fees and expenses unjust; and (3) the $15,773.00 in fees and expenses sought in Appellant's application are reasonable.

STATEMENT OF THE CASE

Appellant initiated this appeal on August 27, 2019, seeking to appeal the August 15, 2019, decision of the Board of Veterans' Appeals (Board) that denied entitlement to continued eligibility for the Civilian Health and Medical Program of the VA (CHAMPVA) program as a child of the Veteran. Notice of Appeal, *Petite v. McDonough*, Vet. App. No. 19-5815 (August 27, 2019). In its decision, the Board denied Appellant's claim, finding that Appellant's CHAMPVA benefits were properly discontinued when she turned 18 years old on August 2, 2017, and was not pursuing an approved VA full-time course of education or training, as she was no longer a child of the Veteran. Record Before the Agency (R.) at 1-8.

Appellant filed her informal, pro se brief on April 1, 2020. Appellant's Informal Brief, *Petite*, Vet. App. No. 19-5815 (April 1, 2020). In her brief, Appellant argued that the Patient Protection and Affordable Care Act of 2012 (ACA) required VA to continue her coverage under the CHAMPVA program until she turned age 26. *Id.* The Secretary filed his response brief on June 1, 2020. Appellee's Brief, *Petite*, Vet. App. No. 19-5815 (June 1, 2020).

Thereafter, the case was referred for a panel, and proceedings were stayed to permit possible arrangements for representation of Appellant. Order, *Petite*, Vet. App. No. 19-5815 (July 30, 2020); Order, *Petite*, Vet. App. No. 19-5815 (August 3, 2020). On October 23, 2020, Kenneth M. Carpenter entered his appearance as lead counsel for the appellant. Appearance, *Petite*,

Vet. App. No. 19-5815 (October 23, 2020). The Court permitted both parties to file substitute briefs. Order, *Petite*, Vet. App. No. 19-5815 (November 4, 2020). Appellant filed a substitute brief on February 3, 2021, Appellee filed a substitute brief on May 6, 2021, and Appellant filed a reply brief on July 1, 2021. Appellant's Brief, *Petite*, Vet. App. No. 19-5815 (February 3, 2021); Appellee's Brief, *Petite*, Vet. App. No. 19-5815 (May 6, 2021); Appellant's reply brief, *Petite*, Vet. App. No. 19-5815 (July 1, 2021).

In-person oral argument was held in this case on October 1, 2021, at 10:00 a.m. in the Regency Ballroom of the Hyatt Regency Capitol Hill located at 400 New Jersey Avenue, NW, Washington, DC 20001. Order, *Petite*, Vet. App. No. 19-5815 (June 16, 2021).

On December 16, 2021, the Court issued a decision that reversed the Board's August 15, 2019, decision finding that Appellant was ineligible to continue to receive CHAMPVA benefits because she was not pursuing a full-time course of instruction, and set aside and remanded the Board's decision for further development, if necessary, and readjudication. *Petite v. McDonough*, 35 Vet.App. 64 (2021). Judgment was issued on January 10, 2022, and mandate entered on March 11, 2022. Judgment, *Petite*, Vet. App. No. 19-5815 (January 10, 2022); Mandate, *Petite*, Vet. App. No. 19-5815 (March 14, 2022).

Appellant filed her application for attorney's fees under EAJA on April 8, 2022. Application for atty's fees under EAJA, *Petite*, Vet. App. No. 19-5815 (April 8, 2022). Appellee now files this response to Appellant's

application.

ARGUMENT

This Court should exercise its authority to deny Appellant entitlement to recovery of attorney's fees and expenses, as the Secretary's position was substantially justified in this case at both the administrative and litigation stages.

The EAJA statute permits the Court to award attorney's fees to an appellant if certain conditions are met:

> Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

28 U.S.C. § 2412(d)(1)(A).

The Supreme Court has set forth four requirements for a fee award in a civil action:

> (1) that the claimant be a "prevailing party"; (2) that the Government's position was not "substantially justified"; (3) that no "special circumstances make an award unjust"; and, (4) pursuant to 28 U.S.C. § 2412(d)(1)(B), that any fee application be submitted to the court within 30 days of final judgment in the action and be supported by an itemized statement.

Comm'r, I.N.S. v. Jean, 496 U.S. 154, 158 (1990).

In determining whether the Government's position was substantially justified, the Court's inquiry focuses on the "totality of the circumstances" pertinent to the Government's position on the issue on which the claimant prevailed, including, among other circumstances, the "state of the law at the time the position was taken," *Smith v. Principi*, 343 F.3d 1358, 1363 (Fed. Cir. 2003), as well as "consistency with judicial precedent and VA policy," *Butts v. McDonald*, 28 Vet.App. 74, 97 (2016) (en banc) (quoting *Stillwell v. Brown*, 6 Vet. App. 291, 301 (1994)). Therefore, "a position can be justified even though it is not correct," and "it can be substantially (i.e., for the most part) justified if a reasonable person could think it correct, that is, if it has a reasonable basis in law and fact." *Stillwell*, 6 Vet.App.at 302 (quoting *Pierce v. Underwood*, 487 U.S. 552, 566 n.2 (1988)).

This Court has determined that the Government's position can be substantially justified where, as here, that position was invalidated in a case of first impression. *See Felton v. Brown*, 7 Vet.App. 276 (1994). In *Felton*, the Court emphasized that it was not adopting a "per se rule that a case of first impression will always render the Government's position substantially justified," *id.* at 281, but it found that the Secretary's position was substantially justified "[g]iven the statutory silence on the particular matter and the lack of a conflict with adverse precedent," *id.* at 283.

The current case, like *Felton*, presented an issue of first impression and the statute was silent on the issue before the Court. No court had previously

addressed the requirements for continued eligibility for the CHAMPVA program after an individual attained age 18. Thus, there was a "lack of a conflict with adverse precedent" in the Secretary's position, both during administrative proceedings and during litigation. *Id.* at 283. Moreover, like *Felton*, this case involved statutory silence on the particular matter before the Court. *See Petite,* 35 Vet.App. 64. The Court's decision noted that "[s]ection 1781 does not expressly define 'child' for CHAMPVA purposes," *id.* at 68, and noted "[s]ection 101(4)(A)'s silence" on the pertinent issue, *id.* at 70. "Given the statutory silence on the particular matter and the lack of a conflict with adverse precedent," in this appeal, the Court should find, as it did in *Felton*, that the Secretary's position was substantially justified, even if that position was invalidated in this case of first impression. *Felton, 7* Vet. App. at 283.

Although 38 U.S.C. § 1781 and 38 U.S.C. § 101(4)(A) were silent on the pertinent issue, the Secretary argued that the broader statutory scheme supported his position, relying on 38 U.S.C. § 1781(b), the CHAMPVA statute, which requires that "the Secretary shall provide for medical care in the same or similar manner and subject to the same or similar limitations as medical care is furnished to certain dependents and survivors of active duty and retired members of the Armed Forces under chapter 55 of title 10 [10 U.S.C. §§ 1071 et seq.] (CHAMPUS)." Appellee's Brief at 16, *Petite*, Vet.App. No. 19-5815 (May 6, 2021). As the Secretary argued, under 10 U.S.C. § 1072, an eligible child who has attained 18 years of age must be "enrolled in a full-time course

of study at an institution of higher learning approved by the administering Secretary." *Id.* at 16-17. The Secretary's position in this case was substantially justified because it was premised on the plain language of the applicable statutes and was thought to be consistent with the broader statutory scheme. The Court was required to decide how the competing statutory instructions were to be read together and how they applied in this case of first impression. The Secretary's position, although incorrect, was premised on the plain language of the CHAMPVA statute, 38 U.S.C. § 1781(b), and thus was substantially justified.

Ultimately, the Secretary urges the Court to find that his position was substantially justified because it was reasonable, albeit incorrect. "Substantially justified" means "justified to a degree that could satisfy a reasonable person." *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). "The standard to be applied . . . for the issue of substantial justification is one of reasonableness . . . ." *Essex Electro Eng'rs, Inc. v. United States*, 757 F.2d 247, 252 (Fed. Cir. 1985); *see Cline v. Shinseki*, 26 Vet.App. 325, 326 (2013) (stating that the "inquiry is designed to evaluate the reasonableness of 'the position taken by the government on the issue on which the claimant prevailed").

The Secretary's brief cited multiple Senate reports that expressly supported his position, demonstrating that reasonable people could understand his position as being justified. Appellee's Brief at 17-18, *Petite v. McDonough*,

Vet. App. No. 19-5815 (May 6, 2021) (citing S. REP. NO. 96-177 at 30 (1979) (noting that, for CHAMPVA purposes, a child retains eligibility "only if he or she is pursuing full-time study at an approved educational institution"); S. REP. NO. 96-177 at 30-31 ("Under current law, a CHAMPVA-eligible child between the ages of 18 and 23 retains such eligibility only if he or she is pursuing full-time study at an approved educational institution.")). Although the Court did not address the cited legislative history, the Court should not now find that the Secretary unreasonably relied on the directly-applicable and expressly-stated understanding in the Senate reports in formulating its position on the pertinent issue in this case of first impression.

The Secretary's position, albeit incorrect, was reasonable because it was consistent with VA policy. *See Butts*, 28 Vet.App. at 83-84 (noting that, under a totality of the circumstances review, consideration may include "consistency with judicial precedent and VA policy"). The Secretary's brief explained that VA had submitted a budget to Congress for FY2021 that proposed legislative changes to increase CHAMPVA eligibility. Appellee's Brief at 20, *Petite*, Vet. App. No. 19-5815 (May 6, 2021). The Secretary's position in this case was formulated on a reasonable, albeit ultimately incorrect, belief the applicable statutory scheme did not permit an expansion of CHAMPVA eligibility and that legislative action to the statutes was necessary.

In *Butts*, this Court also explained that, when the Secretary's position was "wholly unsupported by either the plain language of the statute or its legislative

history," such interpretation "weighs heavily against a finding of substantial justification, and, while not dispositive, makes it difficult to establish substantial justification." 28 Vet.App. at 83 (citing *Patrick v. Shinseki*, 668 F.3d 1325, 1331, 1333) (internal quotation marks omitted). However, in this case of first impression, the Secretary's position had support from both the plain language and broader scheme of 38 U.S.C. § 1781(b) and 10 U.S.C. § 1072, as well as the legislative history of 38 U.S.C. § 1781 through S. REP. NO. 96-177 at 30 and S. REP. No. 96-177 at 30-31, which spoke directly to the question presented in this case of first impression and informed the formulation of the Secretary's position. The Secretary's position was based, in part, upon the legislative history and was not "wholly unsupported by either the plain language of the statute or its legislative history"; therefore, the Secretary's position should be found to be substantially justified as reasonable, albeit incorrect. *Butts*, 28 Vet.App. at 83; *Patrick*, 668 F.3d at 1331, 1333.

Under the "totality of the circumstances" in this case of first impression, the Secretary requests that the Court acknowledge that the Secretary's position was not inconsistent with any then-existing law and had reasonable support from both the broader statutory scheme and legislative history and, although found to be incorrect, nonetheless represented a reasonable position that was substantially justified. As noted above, the Secretary's position does not ultimately need to be correct to be substantially justified. *Patrick,* 668 F.3d at 1330; *see also Norris v. S.E.C.*, 695 F.3d 1261, 1265 (Fed. Cir. 2012)

(holding that substantially justified means there is "a dispute over which reasonable minds could differ") (quotation omitted). Rather, the position just needs to be reasonable. *Pierce*, 487 U.S. at 566 n.2. The Secretary asserts that he has met his burden of demonstrating that his position was reasonable, and therefore substantially justified, at both the administrative and litigation stages, given the state of the law at the time of the administrative and litigation. As a result, the Court should find that Appellant does not meet the threshold requirements of 28 U.S.C. § 2412(d)(1)(A).

CONCLUSION

Because the Secretary was substantially justified in all phases of the adjudication and litigation of the claim on appeal, he respectfully requests that the Court deny Appellant's application for attorney's fees and expenses, consistent with 38 U.S.C. § 2412(d)(1)(A).

Respectfully submitted,

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