UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

THOMAS LARSON,		
Appellant	:	VA App. No. 11-864
v.	:	***APPELLANT'S REPLY TO APPELLEE's RESPONSE TO the APPLICATION FOR ATTORNEY'S FEES***
ROBERT A. McDONALD, Secretary of Veterans Affairs,	:	
Appellee	:	
	:	

Appellant filed a timely application seeking an award of reasonable attorney fees with the Court on October 5, 2014. The Secretary — resting on the identical argument that this Court and the Federal Circuit rejected— asserts that Mr. Larson is not a prevailing party, and that the VA's position was substantially justified. The Secretary does not contest, and therefore concedes, that Mr. Larson has satisfied all other elements of his EAJA claim, including the reasonableness of the amount sought.

Mr. Larson is a prevailing party because, as the Secretary acknowledges at page 4 of his response, "this Court modified the Board decision removing the words Appellant had sought to have removed." That constituted the requisite

finding of administrative error. Had this Court deemed the Board's error non-existent or harmless, it would have denied the motion to modify.

Throughout this appeal, the Secretary challenged every attempt Appellant made to modify the Board decision, as his response accurately recounts. Sec. Resp. at 2 - 4. The Secretary's litigation position was thus not substantially justified. The Court should grant the motion for fees.[1]

Mr. Larson is a prevailing party. As noted, the Secretary agrees, as he must, that this Court modified the Board's decision in precisely the way Appellant sought throughout the course of the litigation. Sec. Resp. at 4. That is, the Court ordered the Board to remove the phrase "or that the correct facts, as they were known at the time, were not before the adjudicators" so that Mr. Larson's ability to raise a new CUE challenge was clear. The Court's modification places the Appellant in "a better position on remand" than he would have been without it because it ensures that he can raise the second CUE challenge. *Gurley v. Nicholson*, 20 Vet. App. 573, 578 (2007). That makes the Appellant a prevailing party.

The Secretary speculates that the RO and the Board would not have used the

[1] If the Court determines that Appellant is entitled to fees, he seeks to file a supplemental application pursuant to App. Rule 39 (b).

Board's adverse finding against him. Sec. Resp. at 5, 9. But in *Young v. Shinseki*, 25 Vet.App. 201, 204 (2012), the Court granted EAJA fees where BVA improperly referred, rather than remanded, a portion of the veteran's claim because "an improper referral *could* result in an improper effective date being assigned by an RO. . ." (emphasis added).

The Secretary essentially repeats the discredited argument he consistently made throughout this litigation: that the Board's language, removed by this Court in its August 28, 2014 decision, would not have harmed Appellant. He continues to argue that the Board's finding did not prevent Mr. Larson from filing a claim based on CUE on an incorrect facts theory. *Compare*, Secretary's Response to EAJA Motion at 2, 3, 5, 8; with Secretary's Opposition to Motion to Modify, page 2; Secretary's Brief on the Merits, pages 2, 5, 9.

At this point, the Secretary has lost that argument. This Court, on August 28, 2014, granted Appellant's motion to modify the Board decision, thus rejecting the Secretary's assertion. The Court did so over the Secretary's opposition — which, as noted, was based on the same argument he presents now. A "'request for attorney's fees should not result in a second major litigation.'" *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health and Human Res.*, 532 U.S. 598, 609 (2001) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983))); *McCormick v.*

Principi, 16 Vet.App. 407, 411 (2002) (Court will not investigate at the EAJA prevailing-party stage the validity, type, or nature of any administrative error that is either conceded or found). On that basis alone, this Court should reject the Secretary's argument and find that Appellant is a prevailing party.

The Secretary focuses on the fact that this Court affirmed the Board's decision as to the CUE claims the Veteran presented to the Board: that the Board found that no CUE existed in the way the RO applied the law. Sec. Resp. at 9. The Secretary misinterprets the concept of administrative error. Administrative error is not limited to mistakes the Board made related only to issues over which the Board had jurisdiction. Rather, the term encompasses the type of error as occurred here, *i.e.*, the Board's mis-statement regarding the scope of the CUE claim before it. Cf., *Young, supra* (granting EAJA fees where Board's decision was modified to reflect remand to the RO, rather than referral, a part of the veteran's claim).

The Board's decision included the finding that the Veteran did not show that the correct facts were not before the adjudicators. R-13. The Board was mistaken to enter that finding as the Veteran had not argued that matter. The issue is not whether *the law permitted* Mr. Larson to raise a CUE challenge under an "incorrect facts" theory. That is undisputed. The question is whether *the Board erred* in stating he had not demonstrated such an error. Unlike the situation in *Halpern v.*

Principi, 384 F. 3d 1297 (Fed. Cir. 2004), the Court did address the merits of the Board's finding as to the "incorrect facts" theory. It was the Board's error as to that finding that constituted administrative error.

Though the Secretary — as he has throughout this litigation — attempts to minimize the impact of the Board's invalid finding, the Federal Circuit did not agree. It took jurisdiction over the matter, and ruled that Appellant's effort to modify the Board's mis-statement was not moot. *Larson v. Shinseki*, 744 F. 3d 1317 (Fed. Cir. 2104). On remand, this Court implicitly agreed that the Board committed an error, by removing the offending language from the BVA decision. Thus, the Secretary's reliance on cases in which the appellant received no relief at all from the court's order are inapplicable to Mr. Larson. See, Secretary's response at 7, citing *Sims v. Apfel*, 238 F.3d 597, 601 (5th Cir. 2001) and *Hewitt v. Helms*, 482 U.S. 755, 760 (1987). As seen, this is not such a case. Mr. Larson received meaningful relief, through an enforceable judgment, in accordance with this Court's "power to affirm, modify, or reverse a decision of the Board or to remand the matter, as appropriate." 38 U.S.C. § 7252(a). And see, *Farrar v. Hobby*, 506 U.S. 103, 112 (1992) ("a plaintiff who wins nominal damages is a prevailing party under § 1988" because he has an enforceable judgment on the merits).

The Secretary relies on *Hanrahan v. Hampton*, 446 U.S. 754, 758 (1980) as

support for his contention that a remand on a procedural matter does not make the Veteran a prevailing party. Sec. Resp.at 7. As noted above, Mr. Larson disagrees with the Secretary's characterization of the result achieved here. Regardless, the Secretary fails to note that *Hanrahan* was distinguished by the Federal Circuit in *Former Employees of Motorola Ceramic Products v. U.S.*, 336 F. 3d 1360 (Fed. Cir. 2003). In *Former Employees*, the Federal Circuit recognized, "[r]emands to administrative agencies are, however, different" from the trial proceeding at issue in *Hanrahan*. The Federal Circuit held instead that, with regard to administrative agencies, "a remand may constitute the securing of relief on the merits." *Former Employees, supra*, at 1365. The Secretary does not cite to *Former Employees*, which stands in opposition to his legal theory and supports an award of fees to Mr. Larson.

The Secretary also continues to mistakenly claim that Appellant "never was or has been precluded from filing additional motions for CUE in the 1969 rating decision." Sec. Response, page 5. But this Court's initial memorandum decision did bar Mr. Larson from filing such a motion. In addition, the Federal Circuit recognized, "if the challenged language in the Board's decision is interpreted as a ruling on just such a "correct facts" theory, Mr. Larson would indeed be precluded from re-raising that same CUE theory in the future." *Larson*, at 1319. Its decision,

and this Court's action modifying the Board's decision also demonstrate the prejudicial error the Board made. *Young, supra* (finding appellant entitled to EAJA fees following Court's decision modifying the underlying, appealed BVA decision to reflect remand rather than referral).

The Secretary's position at the administrative and litigation stages was not substantially justified. The Secretary agrees that the Veteran did not challenge the RO's finding on an "incorrect facts" theory. Sec. Response at 1. And he concedes that the Appellant was successful in having the Board's statement as to the "incorrect facts" theory removed. Sec. Resp. at 4. The Secretary nonetheless argues that there was no administrative error. This is simply another effort at re-litigating the propriety of the Board's action. The Court should reject that effort and find that the Secretary has not established that his administrative position was substantially justified.

The Secretary, furthermore, has the burden of showing that his position was substantially justified at *both* the administrative *and* litigation stages. *See Bates v. Nicholson*, 20 Vet.App. 185, 190-91 (2006). The court's inquiry as to substantial justification "must focus on the circumstances pertinent to the position taken by the government on the issue on which the claimant prevailed . . ." *Smith v. Principi*, 343 F.3d 1358, 1363 (Fed. Cir. 2003).

The Secretary contends that he "acted reasonably at each stage of the proceedings." Secretary's response at 12. But his response details his resolute resistance, at every step of this litigation, to the modification of the Board's decision Appellant sought and this Court ultimately ordered. Sec. Resp. at 2, 3. The pleadings also demonstrate that the Secretary repeatedly rejected undersigned counsel's efforts to resolve the matter through joint agreement at each step of the litigation. Specifically:

- the Secretary would not agree to a joint motion for remand, see, CAVC docket noting stays for possible joint resolution;
- the Secretary opposed Appellant's CAVC motion to modify the Board's decision;
- the Secretary refused to participate in the Federal Circuit's mediation program, despite undersigned counsel's belief that it could be productive (see, Federal Circuit Docketing Statements, attached);
- Appellant delayed filing his Federal Circuit brief for four months, based on an effort to resolve the matter without briefing. See, Federal Circuit Docket, attached.

If these do not persuade the Court of the Secretary's unwillingness to resolve the matter without litigation, Appellant can provide the Court with copies of emails

exchanged with the Secretary's counsel, at both the CAVC and Federal Circuit stages, demonstrating Appellant's ongoing but unsuccessful efforts to curtail litigation though a joint agreement. Such an agreement at any point would have demonstrated reasonable behavior on the Secretary's part. No such agreement was forthcoming, despite Appellant's constant efforts. Hence, it was not the Appellant, but the Secretary, who forced litigation of the matter, resulting in a judicial order in Appellant's favor. The Secretary has not established that his litigation position was substantially justified.

Conclusion. The Secretary's argument is merely an attempt to resurrect the legal theory he unsuccessfully argued before this Court and before the Federal Circuit: since there was allegedly no error in the Board's original decision, the subsequent court-mandated modification was superfluous. Sec. Resp. at 2, 3, 4, 5, 8, 9, 11, 12. Despite repeating his failed justification for the Board's erroneous holding on nearly every page of his response, the Secretary never explains why, if he is correct, the Federal Circuit and this Court have agreed with Appellant. See, *Stillwell v. Brown*, 6 Vet. App. 291, 302 (1994) (Once the appellant alleges that VA's position was not substantially justified, the Secretary has the burden of demonstrating substantial justification).

This Court exercised its authority in favor of Mr. Larson, over the

Secretary's repeated objections. The Court should grant the petition in full.

Respectfully submitted,

/s/Barbara J. Cook

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APPENDIX

Federal Circuit Docket Sheet, Larson v. Shinseki, #13-7060, pages 1, 3

General Docket
United States Court of Appeals for the Federal Circuit

Court of Appeals Docket #: 13-7060 **Docketed:** 02/04/2013
Larson v. Shinseki **Termed:** 03/10/2014
Appeal From: United States Court of Appeals for Veterans Claims
Fee Status: In Forma Pauperis

Case Type Information:
1) Civil US
2) -
3) -

Originating Court Information:
District: --15-1 : 11-0864
Trial Judge: Lawrence B. Hagel, Judge
Date Filed: 03/14/2011
Date NOA Filed: 01/31/2013
Date Rec'd COA: 02/04/2013

Prior Cases:
None

Current Cases:
None

THOMAS L. LARSON Claimant - Appellant	Barbara J. Cook, - Direct: 513-751-4010 Email: bcook@fuse.net Fax: 513-977-4221 [LD NTC Retained] Barbara J. Cook, Attorney at Law Suite 300 917 Main Street Cincinnati, OH 45202
v.	
ERIC K. SHINSEKI, SECRETARY OF VETERANS AFFAIRS Respondent - Appellee	Allison Kidd-Miller Email: Allison.Kidd-Miller@usdoj.gov [LD NTC Government] Department of Justice Commercial Litigation Branch, Civil Division PO Box 480 Ben Franklin Station Washington, DC 20044 Christina Lynn Gregg, General Attorney Direct: 202-461-7699 Email: christina.gregg@va.gov Fax: 202-273-6404 [COR NTC Government] Department of Veterans Affairs Office of General Counsel Firm: 202-461-7657 810 Vermont Avenue, NW Washington, DC 20420 Michael James Timinski, Deputy Assistant General Counsel Email: Michael.Timinski@va.gov [COR NTC Government] Department of Veterans Affairs Office of General Counsel Firm: 202-461-7657 810 Vermont Avenue, NW Washington, DC 20420

02/04/2013	☐ 1 16 pg, 206.28 KB	Appeal docketed. Received: 02/04/2013. [47826] Entry of Appearance due 02/19/2013. Certificate of Interest is due on 02/19/2013. Docketing Statement due 03/06/2013. Appellant/Petitioner's brief is due 04/05/2013.
02/11/2013	☐ 2 1 pg, 520.16 KB	Entry of appearance for Barbara J. Cook as principal counsel for Appellant Thomas L. Larson. Service: 02/11/2013 by US mail, email. [49657]
02/11/2013	☐ 3 1 pg, 368.43 KB	Certificate of Interest for the Appellant Thomas L. Larson. Service: 02/11/2013 by US mail, email. [49658]
02/20/2013	☐ 4 2 pg, 61.33 KB	Entry of appearance for Michael Timinski as of counsel for Appellee Shinseki. Service: 02/20/2013 by email. [52285]
02/20/2013	☐ 5 2 pg, 66.52 KB	Entry of appearance for Christina L. Gregg as of counsel for Appellee Shinseki. Service: 02/20/2013 by email. [52289]
02/26/2013	☐ 6 3 pg, 1.07 MB	Docketing Statement for the Appellant Thomas L. Larson. Service: 02/26/2013 by email. [53919]
03/06/2013	☐ 7	Docketing Statement for the Appellee Shinseki. Service: 03/06/2013 by email. [56236] This document has been rejected. See Doc No. [8]
03/07/2013	☐ 8 1 pg, 16.15 KB	Notice of Rejection to Appellee Shinseki, the following document(s) cannot be filed: [7] docketing statement. Reason(s) Attorney who filed document has not filed an entry of appearance.. Docketing Statement due 03/18/2013. Service: 03/07/2013 by clerk.
03/18/2013	☐ 9 2 pg, 44.22 KB	Entry of appearance for Allison Kidd-Miller as principal counsel for Appellee Shinseki. Service: 03/18/2013 by email. [59638]
03/18/2013	☐ 10 4 pg, 75.86 KB	Duplicate Docketing Statement for the Appellee Shinseki. Service: 03/18/2013 by email. [59640]
03/19/2013	☐ 11 6 pg, 60.72 KB	MOTION of Appellant Thomas L. Larson to extend the time to 06/04/2013 at 11:59 pm to file the appellant/petitioner's principal brief. Response/Opposition is due 04/01/2013 [Consent: unopposed]. Service: 03/19/2013 by email. [59836]
03/19/2013	☐ 12 2 pg, 69.17 KB	ORDER granting motion to extend time to file appellant/petitioner principal brief [11] filed by Appellant Thomas L. Larson Brief due 06/04/2013.. Service: 03/19/2013 by clerk. [59907]
05/08/2013	☐ 13 6 pg, 411.66 KB	MOTION of Appellant Thomas L. Larson to extend the time to 08/05/2013 at 11:59 pm to file the appellant/petitioner's principal brief. Response/Opposition is due 05/23/2013 [Consent: unopposed]. Service: 05/08/2013 by email. [75605]
05/15/2013	☐ 14 2 pg, 58.72 KB	ORDER granting motion to extend time to file appellant/petitioner principal brief [13] filed by Appellant Thomas L. Larson Brief due 08/05/2013. Service: 05/15/2013 by clerk. [77824]
08/01/2013	☐ 15 30 pg, 1.03 MB	TENDERED from Appellant Thomas L. Larson. Title: OPENING BRIEF. Service: 08/01/2013 by email. [95461]
08/01/2013	☐ 16 30 pg, 1.05 MB	BRIEF FILED for Appellant Thomas L. Larson [15]. Title: Claimant-Appellant's Brief, [Non-Confidential version only]. Number of Pages: 12. Service: 08/01/2013 by email.. Pursuant to ECF-10, filer is directed to file six copies of the brief in paper format. The paper copies of the brief should be received by the court on or before 08/12/2013. Appellee Eric K. Shinseki, Secretary of Veterans Affairs brief is due 09/13/2013. [96633]
08/09/2013	☐ 17	6 paper copies of the 1st brief Brief [16] received from Appellant Thomas L. Larson. [97449]
09/13/2013	☐ 18 21 pg, 45.15 KB	TENDERED from Appellee Shinseki. Title: REPLY BRIEF. Service: 09/13/2013 by email. [103610]
09/13/2013	☐ 19 21 pg, 69.47 KB	BRIEF FILED for Appellee Shinseki [18]. Title: Brief for Respondent-Appellee, [Non-Confidential version only]. Number of Pages: 15. Service: 09/13/2013 by email.. Pursuant to ECF-10, filer is directed to file six copies of the brief in paper format. The paper copies of the brief should be received by the court on or before 09/25/2013. Appellant Thomas L. Larson reply brief is due 09/30/2013. [105187]
09/20/2013	☐ 20 3 pg, 36.67 KB	MOTION of Appellant Thomas L. Larson to extend the time to 10/15/2013 at 11:59 pm to file the reply brief. Response/Opposition is due 10/03/2013 [Consent: unopposed]. Service: 09/20/2013 by email. [105308]
09/20/2013	☐ 21 2 pg, 69.34 KB	ORDER granting motion to extend time to file reply brief [20] filed by Appellant Thomas L. Larson reply brief is due 10/15/2013. Service: 09/20/2013 by clerk. [105366]
09/20/2013	☐ 22	6 paper copies of the 2nd brief Brief [19] received from Appellee Shinseki. [105474]
10/11/2013	☐ 23 24 pg, 152.79 KB	TENDERED from Appellant Thomas L. Larson. Title: REPLY BRIEF. Service: 10/11/2013 by email. [109627]
10/11/2013	☐ 24 24 pg, 151.82 KB	BRIEF FILED for Appellant Thomas L. Larson [23]. Title: Claimant-Appellant's Reply Brief, [Non-Confidential version only]. Number of Pages: 12. Service: 10/11/2013 by email. Pursuant to ECF-10, filer is