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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 11-0864(E)

THOMAS L. LARSON, APPELLANT,

v.

ROBERT A. MCDONALD,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before HAGEL, *Judge*.

O R D E R

Note: Pursuant to U.S. Vet. App. R. 30(a), this action may not be cited as precedent.

Before the Court is Thomas L. Larson's November 22, 2014, application pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412(d) (EAJA), for an award of attorney fees and expenses in the amount of $18,937.72. The Court has jurisdiction pursuant to 28 U.S.C. § 2412(d)(2)(F) to award reasonable attorney fees and expenses. In this case, Mr. Larson filed his EAJA application within the 30-day time period set forth in 28 U.S.C. § 2412(d)(1)(B), and his application satisfies that section's content requirements. *See Scarborough v. Principi*, 541 U.S. 401, 408 (2004). The Secretary filed a response in which he argues that Mr. Larson is not a prevailing party under 28 U.S.C. § 2412(d)(1)(A) and, therefore, is not entitled to EAJA fees. Alternatively, the Secretary argues that his position was substantially justified. Because the Court concludes that Mr. Larson is a prevailing party and that the Secretary's position was not substantially justified, the Court will grant Mr. Larson's EAJA application in full.

I. BACKGROUND

On March 3, 2011, the Board of Veterans' Appeals (Board) issued a decision that found no clear and unmistakable error in a July 25, 1969, VA regional office decision. The Board identified Mr. Larson's two arguments asserting clear and unmistakable error, both relating to the application of the correct diagnostic codes. The Board then rejected those arguments and concluded that Mr. Larson "has not demonstrated that the law in effect during that time was incorrectly applied or that the correct facts as they were known at the time, were not before the adjudicators." Record at 12. Mr. Larson appealed that decision to the Court.

While on appeal at the Court, Mr. Larson initially challenged the Board's findings regarding the two arguments asserting clear and unmistakable error. However, on June 11, 2012, Mr. Larson

filed a motion to modify the Board decision to remove the phrase "or that the correct facts, as they were known at the time, were not before the adjudicators." Appellant's Motion to Modify at 1-2 ("Appellant agrees that if that phrase is deleted, the Court could otherwise affirm the Board's decision."). He argued that the phrase in the Board decision could be interpreted as a ruling on an assertion of clear and unmistakable error on a factual basis, thus precluding him from raising such an assertion in the future. On January 9, 2013, the Court affirmed the March 2011 Board decision and dismissed Mr. Larson's motion to modify that decision as moot.

Mr. Larson appealed to the U.S. Court of Appeals for the Federal Circuit (Federal Circuit). The Federal Circuit found that Mr. Larson's motion to modify the Board decision was not moot because "Mr. Larson only challenged the *legal* basis for the Regional Office's 1969 determination, and did not assert that the adjudicators did not have the correct facts before them at the time of the decision." *Larson v. Shinseki*, 744 F.3d 1317, 1319 (Fed. Cir. 2014). The Federal Circuit further stated:

> Mr. Larson remains free to raise a "correct facts" [clear and unmistakable error] claim in the future at the Regional Office. However, 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 [clear and unmistakable error] theory in the future. Thus, his request for clarification or modification of the Board's decision was anything but moot.
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> . . .
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> Mr. Larson's motion to modify raises the possibility that the Board's decision . . . could be interpreted as a ruling on a third [clear and unmistakable error] claim relating to whether the correct facts were before the adjudicator. We therefore reverse the Veterans Court's denial of Mr. Larson's motion to modify the Board's decision as moot, and remand for the court to consider the merits of that motion.

Id.

The appeal returned to the Court and on August 28, 2014, the Court granted Mr. Larson's motion to modify the March 3, 2011, Board decision, and removed the phrase "or that the correct facts, as they were known at the time, were not before the adjudicators" from that decision. Record at 12. The Court affirmed the Board decision as modified.

II. PARTIES' ARGUMENTS

On November 22, 2014, Mr. Larson submitted his application for attorney fees, asserting that he is a prevailing party because the Court's modification of the March 2011 Board decision "materially altered the relationship between the parties, because it removed a barrier for Mr. Larson

in pursuing a request for revision based on clear and unmistakable error." EAJA Application (App.) at 2. He also asserts that the Secretary's position was not substantially justified.

On March 13, 2015, the Secretary responded, arguing that Mr. Larson is not a prevailing party because he "received no relief that he did not already possess prior to the outset of the litigation." Secretary's Response (Resp.) at 5. The Secretary contends that Mr. Larson "never was or has been precluded from filing additional motions for [clear and unmistakable error] in the 1969 rating decision. The law has always allowed for consideration of a new theory of [clear and unmistakable error] when a claimant seeks to collaterally challenge a rating decision." *Id.* The Secretary further argues that his position was substantially justified because "[a]t all times, the Secretary took the position that [Mr. Larson]'s litigation from the outset was unnecessary to preserve a right that, as the Secretary pointed out, already existed and was not precluded by any specific language in the Board decision." *Id.*

In reply, Mr. Larson argues that the Court's modification places him in "'a better position on remand' than he would have been without it because it ensures that he can raise the second [clear and unmistakable error] challenge." Appellant's Reply at 2. He further argues that the Secretary's position is not substantially justified because "the Secretary repeatedly rejected . . . efforts to resolve the matter through joint agreement at each step of the litigation . . . [and] it was not [Mr. Larson], but the Secretary, who forced litigation of the matter, resulting in a judicial order in [Mr. Larson]'s favor." Appellant's Reply at 8-9.

III. ANALYSIS

A. Prevailing Party Status

EAJA fees may be awarded only when the applicant is a prevailing party. *See* 28 U.S.C. § 2412(d)(1)(A), (1)(B), (2)(B); *Comm'r, INS v. Jean*, 496 U.S. 154, 160 (1990) ("In EAJA cases, the court first must determine if the applicant is a 'prevailing party' by evaluating the degree of success obtained."); *see also Scarborough v. Principi*, 541 U.S. 401, 407-08 (2004). To qualify as a prevailing party, the appellant must "'receive at least some relief on the merits of his claim.'" *Summer v. Principi*, 15 Vet.App. 256, 261 (2001) (en banc) (quoting *Buckhannon Bd. and Care Home, Inc. v. W. Va. Dep't of Health and Human Res.*, 532 U.S. 598, 603 (2001)).

Here, contrary to the Secretary's contention, the Federal Circuit's decision clearly indicates that Mr. Larson has in fact received relief. As noted above, the Federal Circuit found that "if the challenged language in the Board's decision is interpreted as a ruling on [] a 'correct facts' theory," then Mr. Larson would be precluded from raising that same theory of clear and unmistakable error again in the future. *Larson*, 744 F.3d at 1319. Therefore, when the Court, in its August 28, 2014, order, modified the Board decision to remove that phrase, Mr. Larson was no longer at risk of being precluded from asserting that theory of clear and unmistakable error. This is the only relief that Mr. Larson sought and it plainly affects the merits of his claim. Accordingly, the Court finds that Mr. Larson is a prevailing party for EAJA purposes. *See Summer*, 15 Vet.App. at 261.

B. Substantial Justification

The Court will award attorney fees to a prevailing party "unless the Court finds that the position of the United States was substantially justified" or that the other statutory requirements were not met. 28 U.S.C. § 2412(d)(1)(A); *Cycholl v. Principi*, 15 Vet.App. 355, 359 (2001). Because in the instant case Mr. Larson has alleged, pursuant to 28 U.S.C. § 2412(d)(l)(B), that the Secretary's position was not substantially justified, the Secretary "has the burden of proving that his position was substantially justified . . . to defeat the appellant's EAJA application." *Vaughn v. Gober*, 14 Vet.App. 92, 95 (2000) (citing *Stillwell v. Brown*, 6 Vet.App. 291, 301 (1994)). In its determination of whether the Secretary was substantially justified, the Court's inquiry must focus on the "totality of the circumstances" surrounding the Government's adoption of a particular position. *Patrick v. Shinseki*, 668 F.3d 1325, 1332 (Fed. Cir. 2011) (quoting *Smith v. Principi*, 343 F.3d 1358, 1362 (Fed. Cir. 2003)); *see also Stillwell*, 6 Vet.App. at 302 (noting that "totality of the circumstances" includes "merits, conduct, reasons given, and consistency with judicial precedent and VA policy with respect to such position, and action or failure to act, as reflected in the record on appeal and the filings of the parties before the Court").

Here, in arguing that his position was substantially justified, the Secretary attempts to relitigate the issue of prevailing party status. The Secretary asserts: "In fact, there was no Board error, as [Mr. Larson] has alleged; the Board decision was untouched but for the exclusion of a few words, which, had they remained in the decision, would not have altered [Mr. Larson]'s substantive rights one way or the other given the state of the law." Secretary's Response at 11-12.

First, the Secretary's statement that "there was no Board error . . . but for the exclusion of a few words" is baffling. Secretary's Response at 11-12. Given the Federal Circuit's March 10, 2014, decision, as well as the Court's August 28, 2014, order, there clearly was error in the Board's decision. *See Larson*, 744 F.3d at 1319 (noting that "Mr. Larson remains free to raise a 'correct facts' [clear and unmistakable error] claim in the future at the Regional Office" but "if the challenged language in the Board's decision is interpreted as a ruling on just such a 'correct facts' theory," then in the future Mr. Larson would be precluded from re-raising that same theory). Moreover, the entire issue here revolves around those "few words" that have since been excluded from the Board's decision.

Second, assuming for the sake of argument that the Secretary's position that the phrase at issue was meaningless were correct, then it is unclear why the Secretary opposed Mr. Larson's motion to modify the Board decision and did not simply agree to remove the "meaningless" phrase from the decision. The Secretary contends that he "had no authority to instruct the Board to strike language from the [Board] decision on appeal." Secretary's Response at 12. However, he certainly had the authority to enter into a joint agreement with Mr. Larson requesting that the Court modify the Board decision. Moreover, the Secretary was provided amply opportunity to do so, as Mr. Larson correctly notes. Appellant's Reply at 8. Before the parties submitted their initial brief, the Court granted a joint motion to stay proceedings because the parties were "discussing a possible joint resolution in the instant case and additional time [was] needed to pursue this course of action.

Therefore, in the interest of judicial efficiency, the parties request[ed] the Court to stay further proceeding for 30 days." September 13, 2011, Joint Motion at 1. Finally, the Secretary has not put forth any supporting argument for his assertion that "the litigation that ensued was by [Mr. Larson]'s choice." Secretary's Response at 12.

Therefore, based on the totality of the circumstances, the Court concludes that the Secretary has failed to demonstrate that his position was substantially justified. *See* 28 U.S.C. § 2412(d)(1)(A); *Patrick*, 668 F.3d at 1332; *Cycholl*, 15 Vet.App. at 359; *Vaughn*, 14 Vet.App. at 95; *Stillwell*, 6 Vet.App. at 302.

C. Reasonableness of Fees

The Secretary does not contest the reasonableness of the fees requested in Mr. Larson's EAJA application, and the fees are not unreasonable on their face. Accordingly, the Court will grant Mr. Larson's EAJA application in full.

IV. CONCLUSION

Upon consideration of the foregoing, it is

ORDERED that Mr. Larson's November 22, 2014, EAJA application is GRANTED in full, in the amount of $18,937.72.

DATED: June 12, 2015

BY THE COURT:

/s/ Lawrence B. Hagel

LAWRENCE B. HAGEL
Judge

Copies to:

Barbara J. Cook, Esq.

VA General Counsel (027)