

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

CATHERINE CORNELL,)	
Appellant,)	
)	
v.)	Vet. App. No. 15-3191
)	
ROBERT L. WILKIE,)	
Secretary of Veterans Affairs,)	
Appellee,)	
)	
BOBBY S. MOBERLY,)	
Intervenor.)	

SECRETARY’S RESPONSE TO INTERVENOR’S SUPPLEMENTAL APPLICATION FOR ATTORNEY FEES AND EXPENSES

Currently before the Court is Intervenor’s supplemental application for fees and expenses, which is based upon the Court’s May 31, 2019, order granting his initial application for attorney fees and expenses pursuant to the Equal Access to Justice Act (EAJA). Pursuant to U.S. Vet. App. R. 39(b)(1), the Secretary hereby responds to Intervenor’s supplemental application.

The Secretary objects to the instant application to the same extent and on the same bases that he objected to Intervenor’s initial EAJA application. It remains the Secretary’s position that the action of this Court speaking to the Secretary’s putative authority to recoup certain money from Intervenor, which action forms the predicate of Intervenor’s asserted entitlement to an EAJA award, was undertaken without jurisdiction and is, therefore a nullity. In this regard, the Secretary, on June 20, 2019, filed a motion requesting full-Court review of the May 31, 2019, panel order granting Intervenor’s EAJA application. In the event that the full Court reviews and reverses the panel’s determination, that would undermine the viability of the instant application. See U.S. Vet. App R. 39(b) (premising a supplemental EAJA application on the grant of an initial EAJA application). Accordingly, to the extent that the question of the viability of Intervenor’s initial application remains

open, the Secretary must object to the instant application for the same reasons that he objected to the initial application.

However, should the panel's May 31, 2019, order ultimately remain undisturbed, the Secretary would no longer have any objection to Intervenor's application for supplemental fees and expenses. Accordingly, subject to the ultimate resolution of the Secretary's objection to Intervenor's initial EAJA application and for the sole purpose of avoiding further litigation and related costs, the Secretary does not contest the reasonableness of Appellant's fees or expenses, see 28 U.S.C. § 2412(d)(1)(C). Additionally, the Secretary – again, contingent on the full Court's ruling on his pending motion – waives any defense regarding whether Appellant has met the three predicate findings for an award of attorney fees and expenses under the EAJA: whether (1) Appellant is a “prevailing party”; (2) the Secretary's position was not “substantially justified”; and (3) there are any “special circumstances” that would make an award unjust. See 28 U.S.C. § 2412(d). He is thus prepared to make payment to Intervenor and the representative of record. The Secretary's position here, however, in no way denotes his position as to any issue or matter presented herein that may potentially affect the litigation or settlement of future applications for attorney fees and costs filed with this Court pursuant to 28 U.S.C. § 2412.

CONCLUSION

WHEREFORE, the Secretary advises the Court that he does not contest a supplemental EAJA award in the instant case, up to \$6,639.92.

Respectfully submitted,

JAMES M. BYRNE
General Counsel

MARY ANN FLYNN
Chief Counsel

/s/ Richard A. Daley
RICHARD A. DALEY
Deputy Chief Counsel

/s/ Mark D. Gore
MARK D. GORE
Appellate Attorney
Office of General Counsel (027B)
U.S. Department of Veterans Affairs
810 Vermont Avenue, N.W.
Washington, D.C. 20420
(202) 632-6935