In The
UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

Catherine Cornell, Appellant, v. Robert L. Wilkie, Secretary of Veterans Affairs, Appellee. Bobby S. Moberly, Intervenor	)))))))))))	No. 15-3191 **Intervenor's Response To Appellee's Motion For Full-Court Review**

The Secretary's prolonging of this matter – and his surely inevitable appeal to the United States Court of Appeals for the Federal Circuit – suggests that a Full-Court decision *is* necessary and appropriate but *only* to focus such an appeal on the issues necessary to decide the pending Equal Access to Justice Act (EAJA) application: (1) that the Secretary cannot challenge this Court's jurisdiction over a merits issue at the EAJA stage and (2) that any issues in a decision of this Court not raised on appeal to the Federal Circuit are final and not subject to collateral attack at the EAJA stage. As such conclusions are already compelled by controlling case law, resolution of the jurisdictional issue so troubling to the Secretary is actually immaterial to this Court's approval of the challenged EAJA application – and the Full Court should so hold.

In any event, it is inescapable that the question of whether the Secretary can belatedly raise his jurisdictional argument in the current EAJA action must first be resolved – and resolved in the affirmative – before the Court need address that argument. If the issue cannot be raised at this point, the Court need decide nothing further.

This is the situation here. Indeed, for all the opportunities afforded to the Secretary, including the pending motion, he has failed to cite a single controlling case which provides that the merits of a final decision of this Court reviewed and affirmed by the Federal Circuit can be re-litigated as a part of an EAJA application. Mr. Moberly, however, relies on controlling case law to refute the Secretary's position.

First, this Court in *Blue v. Wilkie* explicitly stated that a merits litigation and an EAJA action "are different matters." 30 Vet. App. 61, 68 (2018). Further, it is unassailable that a final judgment "*puts an end to the cause of action*, which cannot again be brought into litigation between the parties *upon any ground whatever*." *Nevada v. US*, 463 US 110, 129-30 (1983) (emphasis supplied). The Federal Circuit has also held that a "[r]equest for attorney's fees should *not result in a second major litigation*." *Naekel v. DOT, FAA*, 884 F.2d 1378, 1379 (Fed. Cir. 1989) (emphasis supplied).

Contrary to the Secretary, therefore, because the merits litigation and the EAJA action are separate actions, the issue of jurisdiction over the merits litigation does *not* "remain salient even during the EAJA phase of an appeal," Sec'y Mot. at 3, especially when, as here, the matter has been appealed to and finally ruled upon by a superior tribunal (i.e., the Federal Circuit). "A litigant . . . may raise a court's lack of subject-matter jurisdiction at any time in *the same civil action*, even initially at the highest appellate instance." *Id*. (citing *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004) (emphasis supplied)). "Even subject matter jurisdiction, however, may not be attacked collaterally." *Kontrick*, 540 U.S 455 n.9. The "need for finality *forbids* a court called upon to enforce a final order to 'tunnel back . . . for the purpose of reassessing prior jurisdiction de novo.'" *Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 154 (2009); *see also Ins. Corp of Ir. Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 n.9 (1982) ("A party that has *had an opportunity* to litigate the question of subject-matter jurisdiction *may not* . . . *reopen* that question in a collateral attack upon an adverse judgment" (emphasis supplied)); *Gonzalez v. Dep't of Transp*., 551 F.3d 1372, 1379 (Fed. Cir. 2009) ("In most circumstances a party *may not collaterally attack a final judgment* on the ground that subject matter

jurisdiction was lacking in the original action, even if the issue of subject matter jurisdiction was not litigated before." (emphasis supplied)); *Willy v. Coastal Corp*., 503 U.S. 131, 137 (1992) (need for finality in litigation justifies a rule against collateral attacks on subject matter jurisdiction).

Finally, the U.S. Supreme Court has explicitly stated that a "[c]ourt's final, unappealed, and now unappealable judgment *puts an end to the cause of action*, which cannot again be brought into litigation between the parties *upon any ground whatever*." *Nevada***,** 463 U.S. at 129-30 (emphasis supplied).

> Simply put, the doctrine of *res judicata* provides that when a final judgment has been entered on the merits of a case, [it] is a *finality as to* the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to *any other admissible matter which might have been offered* for that purpose.

Id. (emphasis supplied) (internal quotations omitted). Thus again, because a "merits determination and a decision concerning the award of fees under the EAJA are different matters," *Blue,* 30 Vet. App. at 68, "the time for raising such jurisdictional objections has passed." *Porriello v. Shulkin*, 30 Vet. App. 1, 7 (2018); *see also McCormick v. Principi,* 16 Vet. App. 407, 411 (2002) ("Nor should the Court revisit at

the EAJA stage the logic of the merits decision."); *Dillon v. Brown*, 8 Vet. App. 165, 168 (1995) (rejecting result which "would now have the Court reach back and, in essence, readjudicate the appeal de novo.").

The Secretary here had the same opportunity as Mr. Porriello to raise his jurisdictional issue with the underlying decision (the December 12, 2016, panel decision) both to this Court and to the Federal Circuit. The Secretary, however, did not raise any such jurisdictional challenge, either in reconsideration to this Court or in his briefs or oral argument to the Federal Circuit. As a result of the Secretary's inaction, "[c]aselaw uniformly provides that he may not attack the jurisdiction . . . of this Court, or of the Federal Circuit, collaterally." *Porriello*, 30 Vet. App. at 8 (citing *Travelers Indem.*, 557 U.S. at 154; *Kontrick*, 540 U.S. at 455; *Willy*, 503 U.S. at 137; *Ins. Corp. of Ir.*, 456 U.S. at 702 n.9; *Chicot Cty. Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 376 (1940); *Gonzalez v. Dep't of Transp.*, 551 F.3d 1372, 1379 (Fed. Cir. 2009)). Thus, the decisions of this Court and the Federal Circuit are valid as well as *final*. 30 Vet. App. at 8-9.

The case law snippets cited by the Secretary do not support a different result. In citing *Gonzalez v. Thaler*, 565 U.S. 134, 141 (2012), for the proposition that "[s]ubject-matter jurisdiction can never be

waived or forfeited," Sec'y Mot. at 3, the Secretary glosses over the qualifier that the "objections may be resurrected at any point in *the* litigation." *Id*. (emphasis added). As "*the* litigation" in this case became final when the time to appeal the Federal Circuit decision expired, the Secretary's belated objection did *not* occur at a point "in" the litigation. Further, whatever relevance *Young v. Shinseki*, 25 Vet. App. 201 (2012), may have, that case cannot be read to overrule or support a result contrary to the controlling law cited in *Porriello*. *See* 30 Vet. App. at 8 (citing U.S. Supreme Court and Federal Circuit cases).[1] The Secretary's jurisdictional argument is therefore irreconcilably and inexcusably late and thus need not be reached or addressed by the Full Court to uphold Mr. Moberly's EAJA award.

Further, should the Court elect to address the issue, the Secretary's poorly explained distress with the Court's jurisdiction over a rare, if not factually unique case, pales in comparison with the havoc which would ensue should the Court hold that the merits of cases finally decided by this Court *and* the Federal Circuit can be relitigated in EAJA actions before this Court. Such a novel precedent could result in *thousands* of

[1] Of course, *Young must* be read consistent with the above cited controlling case law or have any conflict resolved by the Full Court.

potential EAJA "merits challenges" each year *to the holdings of a superior court*. Allowing such additional bites at the merits would also practically double the Court's case load *and* create a new "hamster wheel" with cases spinning from merits litigation to EAJA litigation and back to merits litigation and further EAJA litigation until one side or the other concedes or exhausts itself (or the Court). There is no basis for such never-ending litigation[2] in this, or any other, tribunal.

To remove any possibility of such a bizarre interpretation of the panel's language, Mr. Moberly respectfully requests that the Full Court clarify two specific statements in the panel's EAJA decision.[3] First, the Full Court should unequivocally state that the Secretary "*cannot*" raise a challenge to the Court's jurisdiction on any aspect of the merits in the subsequent EAJA litigation, at least under the procedural posture of this case. *See* EAJA Dec. at 5 (stating that "it *is not clear* that at this stage of proceedings the Secretary may raise his challenge to the

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[2] Indeed, if the Secretary's position that "[s]ubject-matter jurisdiction can never be waived or forfeited" is adopted in the literal sense proposed, no decision of this Court will ever be safe from collateral challenge, and will provide the Secretary another means to evade decisions of this Court. *See, e.g.*, *Staab v. McDonald*, 28 Vet. App. 50.

[3] *Cornell v. Wilkie*, CAVC No. 15-3191(E).

Court's jurisdiction" (emphasis supplied)). Similarly, the Full Court should clarify that the Secretary's jurisdictional challenge unequivocally "*was*" a prohibited collateral attack on a final decision. *See id.* ("the challenge to the Court's jurisdiction to make its bench announcement *may be* an impermissible collateral attack on a decision that is final." (emphasis supplied)). Such clarifications will serve both parties and the Federal Circuit well should the Secretary insist on further extending this interminable case, as well as provide unequivocal guidance to prevent similar attempts to "tunnel back" and revise merits decisions in future cases before this Court.

WHEREFORE, Intervenor Bobby S. Moberly responds in support of Appellee's Motion For Full-Court Review Of The Court's May 31, 2019, Panel Order for clarification of the issues identified above.

Respectfully submitted,

/s/ Douglas J. Rosinski
Douglas J. Rosinski, Esq.
701 Gervais St., Ste. 150-405
Columbia, SC 29201-3066
803.256.9555 (tel)
888.492.3636 (fax)
djr@djrosinski.com
Counsel to Bobby S. Moberly