

**IN THE UNITED STATES COURT
OF APPEALS FOR VETERANS CLAIMS**

MATTHEW W. CRUMLICH,)	
)	
Petitioner,)	
)	
v.)	Vet. App. No. 17-2630-EAJA
)	
ROBERT L. WILKIE,)	
Secretary of Veterans Affairs,)	
)	
Respondent.)	

**THE SECRETARY’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 does not attest that any special circumstances in this case would make an award of fees and expenses unjust, nor does the Secretary contest the issues of whether Appellant was the prevailing party. The Secretary contests Appellant’s allegation that the position of the United States was not substantially justified.

STATEMENT OF THE CASE

Appellant initiated this appeal on August 14, 2017, seeking to appeal the July 31, 2017, decision of the Board of Veterans' Appeals (Board), which denied him entitlement to service connection of a low back disability and post-traumatic stress disorder. [Record Before the Agency (R.) at 1-10.] In this decision, the Board denied Appellant's claims, finding that Appellant had failed to timely perfect his appeal of the August 2013 Rating Decision. [R. at 4.] In providing this decision, the Board found that Appellant had been provided with a Statement of the Case on June 2, 2015, along with a transmittal letter which was "undated", despite the fact that the Statement of the Case, itself, was dated on every page. [R. at 5.] However, the Board noted that the Statement of the Case contained a clear recitation of 38 C.F.R. § 20.302(b), which stated that "the date of mailing of the statement of the case will be presumed to be the same as the date of the statement of the case..." [R. at 6.] On this basis, the Board found that the August 2015 VA Form 9 submitted by Appellant was untimely to perfect his appeal to the Board. [R. at 6-7.]

Appellant filed his brief in this appeal on February 22, 2018. In this brief, Appellant argued that he was denied due process of law when the Department of Veterans Affairs (VA) failed to provide a date on which Appellant's Statement of the Case was mailed. (Appellant's Brief (App. Br.) at 6-8.) Appellant also argued that presumption of regularity in the provision of his Statement of the Case was not applicable, as VA had failed to follow its regular processes. (App. Br. at 8-12.)

Finally, Appellant argued that the Board erred in its decision when it failed to waive the timeliness requirements for his substantive appeal. (App. Br. at 11-12.)

In response to Appellant's brief, the Secretary argued that Appellant was provided with due process of law, as it was clear from the information provided to Appellant when his substantive appeal was to be provided. (Secretary's Brief (Sec. Br.) at 6-9.) The Secretary also argued that the presumption of regularity, referenced by Appellant, was not for consideration in this appeal, as the regulatory presumption of 38 C.F.R. § 20.302(b) was to be applied, and the regulatory presumption trumped the generalized presumption found in the case law. (Sec. Br. at 9-11.) Finally, the Secretary argued that the Board properly followed the applicable regulations in refusing to waive the timeliness requirements for Appellant's substantive appeal. (Sec. Br. at 12-14.) Appellant's reply brief was filed on July 5, 2018, reiterating Appellant's arguments from his opening brief.

On August 14, 2018, this appeal was submitted to a panel for consideration. At that time, the Court also ordered that the parties were to submit an additional memorandum of law with respect to four separate questions relating to the application of the regulatory presumption of 38 C.F.R. § 20.302(b), the relation between the regulatory presumption and the presumption of regularity, and the sufficiency of the notice provided to Appellant. On August 17, 2018, Appellant motioned this Court for oral argument, which the Secretary opposed on August 29, 2018. The parties then submitted their supplemental memoranda, responding to the Court's questions, on September 13, 2018. In these pleadings, neither party

presented any argument relating to the propriety of the regulatory presumption under the applicable statute.

Oral argument in this appeal was then held before the Court on January 15, 2019. Specifically, the panel of this Court was composed of Judges Coral W. Pietsch and Amanda L. Meredith, presided over by Chief Judge Robert N. Davis. During his oral argument, Appellant's counsel presented for the first time an argument that the regulatory presumption of 38 C.F.R. § 20.302(b) was inconsistent with the statutory provisions of 38 U.S.C. § 7105(d). At no point in the pleadings up to that point had Appellant's counsel ever presented any argument about, or even citation to, 38 U.S.C. § 7105.

Following argument, the Court ordered the Secretary to show cause why the regulatory presumption of 38 C.F.R. § 20.302(b) should not be invalidated, based on Appellant's newly presented argument. The Secretary provided his response to the Court's order on February 19, 2019, and the Court issued its decision in this case on June 6, 2019. In this decision, the Court found that the regulatory presumption of 38 C.F.R. § 20.302(b) was inconsistent with the statutory requirements of 38 U.S.C. § 7105, and so the Court invalidated the regulatory presumption. (Decision at 8-12.) The Court also found that the presumption of regularity had been rebutted, and so the Court vacated the Board's decision and remanded Appellant's claims with instructions that the Board consider two specific issues. (Decision at 13-14.)

Judgement of the Court issued on June 28, 2019, and the Court entered Mandate of its decision on August 28, 2019. Appellant then filed an application for attorney's fees and expenses on September 24, 2019. In his application, Appellant has asserted that he is entitled to recover \$16,924.58 of attorney's fees and expenses. (Application at 1.) Appellant has also alleged in his application that the Secretary's position was not substantially justified "because the Board failed to consider the evidence within the requirement of the authorizing statute." (Application at 4-5.) The Secretary, hereby, responds to Appellant's application.

SUMMARY OF 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. In particular, the Secretary was substantially justified in the promulgation of the regulatory presumption previously found at 38 C.F.R. § 20.302(b), as the regulation provided a means by which to determine when a claimant had been provided with a Statement of the Case, so as to attempt to provide each claimant with the statutorily mandated 60 day period to perfect his or her appeal. Additionally, the Secretary, through the Board of Veterans' Appeals, was substantially justified in finding that Appellant had not timely perfected his appeal, as the Board is legally bound to apply the Secretary's regulations. Finally, the Secretary was substantially justified in litigating this appeal before the Court, as the Secretary's arguments relied on a regulation which was designed to address an issue not specifically contemplated by the applicable statute and which was

effective at the time of the litigation of this appeal. The Secretary's litigation of this appeal was also substantially justified, given that the regulatory presumption at issue in this appeal had been effective for many years, and the validity of that regulation had never before been questioned. Accordingly, the position of the United States was substantially justified in this case, under 28 U.S.C. § 2412(d)(1)(A), and so Appellant is not entitled to an award of attorney's fees and expenses.

ARGUMENT

Section 2412(d)(1)(A) of Title 28 of the United States Code allows this Court to award fees and expenses to an appellant who prevails in an appeal against the United States. Under the statute, an appellant is entitled to such an award when they are the "prevailing party", "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). In order for the position of the United States to be "substantially justified", under the statute, the government must be substantially justified both in its litigation position and its action, or inaction, prior to the litigation. 28 U.S.C. § 2412(d)(1)(B); *Stillwell v. Brown*, 6 Vet.App. 291, 302 (1994). Put differently, the position of the government must be substantially justified at both the administrative and litigation levels. *Ozer v. Principi*, 16 Vet.App. 475, 477-479 (2002).

This Court has further held that, in cases in which the Court invalidated a regulation of the Secretary's, the Secretary's position is only substantially justified at the "administrative level" when the Secretary was substantially justified "both in promulgating the regulation and in his position during adjudication of the claim before the agency." *Ozer*, 16 Vet.App. at 477. However, the mere existence of a duly promulgated regulation does not render an agency's position substantially justified. *Felton v. Brown*, 7 Vet.App. 276, 281 (1994). Similarly, the fact that the government may have, ultimately, been unsuccessful in its defense of a regulation "does not raise a presumption that its position was not substantially justified." *Felton*, 7 Vet.App. at 281 (citing *Kali v. Bowen*, 854 F.2d 329, 332 (9th Cir. 1988)).

Rather, the position of the Secretary is "substantially justified" when "a reasonable person could think it correct, that is, if it has a reasonable basis in law and fact." *Pierce v. Underwood*, 487 U.S. 552, 566 (1988). As such, a position may be justified "even though it is not correct". *Id.* The question of whether the Secretary's position at both the administrative and litigation levels was substantially justified is to be determined "based upon the totality of the circumstances". *Stillwell*, 6 Vet.App. at 302. These circumstances may include the merits of the Secretary's position, the conduct of the Secretary, the reasons given by the Secretary, and the consistency of the Secretary's position with judicial precedent and the policy of the Department of Veterans Affairs (VA). *Id.* Additionally, in order to be "substantially" justified, the Secretary's position need

not be “justified to a high degree”, but instead it need only be “justified in substance or in the main”. *Felton*, 7 Vet.App. at 280.

In this case, the Court vacated the Board’s July 31, 2017, decision on the basis that it relied upon the regulatory presumption contained in 38 C.F.R. § 20.302(b). Specifically, the Court found that the regulatory presumption of §20.302(b) was invalid as it was “inconsistent with the requirements of [38 U.S.C. §] 7105(d)(3)”. (Decision at 10.) However, the Court noted that the regulatory presumption was in response to a “gap” left in the statute, which “does not answer the question of *how* to determine when an SOC was mailed.” (Decision at 10.) Based on the Court’s decision, the circumstances of Appellant’s claim and this appeal, and the law surrounding this case, the Secretary asserts that he was substantially justified in promulgating the regulatory presumption of 38 C.F.R. § 20.302(b), denying Appellant’s claims for service connection based on that regulatory presumption, and litigating this appeal before the Court.

A. Promulgation of the Regulation

As outlined above, this Court has held that in order for the Secretary’s position at the administrative level to be substantially justified, the Secretary must have been substantially justified in promulgating the regulation whose invalidation was dispositive to this case. *Ozer*, 16 Vet.App. at 477. To that end, this Court held in *Felton* that the Secretary was substantially justified in promulgating the regulation invalidated in that case, “[g]iven the statutory silence on the particular matter and the lack of a conflict with adverse precedent...” *Felton*, 7 Vet.App. at

284. This analysis was then followed by the Court in *Ozer*, which found that “the essence of the merits decision on the validity of the regulation” in both *Felton* and *Ozer* was the same, specifically that the regulation contravened the plain language of the statute and was, thus, invalid. *Ozer*, 16 Vet.App. at 478.

The case at hand is indistinguishable from *Felton*, where the Court acknowledged that the Secretary’s regulation was an attempt to fill “a gap in a statute...” *Felton*, 7 Vet.App. at 284; see also *Ozer*, 16 Vet.App. 478 (noting that *Felton* was potentially distinguishable in that *Felton* involved an attempt by VA to fill a gap in a statute). Moreover, the Secretary notes that despite the potentially distinguishing factor operative in *Ozer*, namely that the invalidated regulation was not an attempt to fill a gap in the statute, but was instead in direct conflict with the regulation, the Court in *Ozer* squarely followed the guidance of the Court in *Felton* to find that the Secretary was substantially justified in promulgating his regulation.

The Court should again follow the guidance provided in *Felton* and find that the Secretary was substantially justified in the promulgation of the regulatory presumption of 38 C.F.R. § 20.302(b). In this case, the Court squarely agreed that the regulatory presumption was an attempt by the Secretary to fill “a gap” left in the statute with respect to “*how* to determine when an SOC was mailed”. (Decision at 10.) This same statutory silence on a matter relevant to the case at hand was at play in *Felton*. Additionally, as in *Felton*, the regulation in this case was not in conflict with any adverse precedent at the time of its promulgation, or at any point prior to the Court’s decision in this case, as the regulatory presumption of 38 C.F.R.

§ 20.302(b) had never before been the subject of any decision of this Court. As such, precedent clearly indicates that the Secretary was substantially justified in his promulgation of the regulation at issue in this case.

B. Adjudication of Appellant's Claim

In addition to the promulgation of the Secretary's regulation being substantially justified, the Secretary was also substantially justified in relying on the regulatory presumption of §20.302(b) to deny Appellant's claims for service connection during the adjudication of these claims before the Board. As this Court recognized in *Ozer*, VA and the Board "were bound by law to apply the regulation to the appellants' claim." *Ozer*, 16 Vet.App. at 478. There is no question that the Board is bound by the Secretary's duly passed regulations. See *Fugere v. Derwinski*, 1 Vet.App. 103, 110 (1990). Moreover, as the Court noted in both *Felton* and *Ozer*, the validity of the regulation in question in this case "had not yet been questioned in this case". *Felton*, 7 Vet.App. at 284; *Ozer*, 16 Vet.App. at 478. Accordingly, the Secretary maintains the denial of Appellant's claims during the adjudication of those claims was substantially justified.

In his application, Appellant argues that the Secretary's position was not substantially justified during the adjudication of his claims "because the Board failed to consider the evidence within the requirement of the authorizing statute." (Application at 5.) However, Appellant overlooks the fact that the Board is bound by the Secretary's regulations, and the fact that the regulatory presumption at the center of the Board's decision had not previously been questioned in any capacity

before this Court or in the adjudication of Appellant's claim before VA. *Fugere*, 1 Vet.App. at 110.; *Felton*, 7 Vet.App. at 284. As such, the Court should find that the Secretary was substantially justified in his position during the adjudication of Appellant's claim during the administrative level of this appeal, and so the Secretary's position throughout the administrative level of this appeal was substantially justified.

C. The Litigation Level

In addition to being substantially justified in his position at both phases of the administrative level, the Secretary was also substantially justified in his position before this Court, during the litigation of this appeal. In *Felton*, this Court held that the Secretary's position at the litigation level¹ was "reasonable in law and fact based upon the totality of the circumstances..." because the Secretary's position during litigation before this Court "'was a good faith effort to interpret an evolving area of' the law, and he 'did not take a position which was unreasonable or *in direct conflict with established precedent*.'" *Felton*, 7 Vet.App. at 285 (citing *Citizens for Environmental Quality v. United States*, 731 F.Supp. 970, 997 (D. Colo. 1989 (emphasis added))). In reaching this decision, the Court referred to a holding of the Eighth Circuit, which emphasized the fact that the statutory language at issue in that case, and the legislative history underlying that statute did not contain any

¹ The Secretary notes that the Court in *Felton* referred to the litigation level as the "judicial phase". *Felton*, 7 Vet.App. at 284. Subsequent case law refers to this portion of the claim as the "litigation level" or "litigation stage". *Ozer*, 16 Vet.App. at 478-479; *Johnson v. Principi*, 17 Vet.App. 436, 442 (2004).

guidance as to the issue covered by the regulation. *Felton*, 7 Vet.App. at 285 (Citing *Johnson v. U.S. Department of Housing and Urban Development*, 939 F.2d 586, 590 (8th Cir. 1991)). The Court's analysis in *Felton* was then followed in total by the Court in *Ozer*. *Ozer*, 16 Vet.App. at 478-479.

In this case, the totality of the circumstances indicate that the Secretary's litigation position, and ultimate attempted defense of his regulation, was substantially justified, such that a reasonable person could find that it had a reasonable basis in law and fact. *Underwood*, 487 U.S. at 566 n.2. As an initial matter, the Secretary again notes that he is obligated to follow applicable regulations, and so his defense of the Board's decision was consistent with the law at the time of this appeal. *Fugere*, 1 Vet.App. at 110. The Secretary also again notes that the regulatory presumption of § 20.302(b) had never been the subject of any challenge before this Court, and so his attempt to defend the regulation was not in direct conflict with any previous precedent. *Felton*, 7 Vet.App. at 285. Moreover, the Secretary's regulation was, as the Court acknowledged in its decision, an attempt to answer a question left by the statute, and so the Secretary's position with respect to the validity of the regulatory presumption was a good faith effort to adjudicate an issue of first impression before this Court. (Decision at 10.)

The Secretary would also like to reiterate that his litigation position before this Court was also substantially justified in light of the fact that the issue which was ultimately dispositive in this case; the consistency of the regulatory presumption with the underlying statute, was not raised by Appellant until his

presentation at oral argument before the Court. As the Secretary indicated above, and in his response to the Court's January 17, 2019, Order, Appellant's opening and reply briefs lack any indication of any argument that the regulatory presumption was inconsistent with 38 U.S.C. § 7105(d)(3). As the Court acknowledged in its decision, this issue was only presented for the first time at oral argument, and the Secretary was only provided an opportunity to meaningfully respond to this argument in his response to the Court's January 17, 2019, Order, following oral argument. (Decision at 8-9.) As such, the Secretary's litigation of this appeal was reasonable, given that the arguments presented by Appellant prior to oral argument were not the basis of the Court's decision in this case.

Given that the Secretary was bound by his regulation, which was an attempt to fill an acknowledged gap in the statutory scheme pertaining to the service of Statements of the Case, and given that the regulatory presumption at issue here had never been the subject of any prior adverse precedent, the Secretary's litigation of this appeal had a reasonable basis in law and fact. Moreover, because Appellant did not present any argument as to the controlling issue in the decision of this case until all briefing, and supplementary pleadings, had been completed, and in light of the fact that none of the arguments presented in Appellant's prior pleadings or argument were operative in the Court's decision, the Secretary's litigation of this appeal was clearly substantially justified.

CONCLUSION

In summation, the facts of this case, the law surrounding this case, and the Court's decision in this case all indicate that, considering the totality of the circumstances, the Secretary's position throughout this claim was substantially justified. First, the Secretary was substantially justified in promulgating the regulatory presumption of 38 C.F.R. § 20.302(b), as the regulation served to explain "*how* to determine when an SOC was mailed". (Decision at 10.) The Secretary, through the Board of Veterans' Appeals, was also substantially justified in relying on the regulatory presumption of 38 C.F.R. § 20.302(b), as the Secretary, and the Board, are required to comply with the duly passed and applicable regulations. Finally, the Secretary was substantially justified in litigating this appeal before the Court, as the validity of the regulatory presumption central to the Court's decision was not raised until litigation of this appeal was substantially complete. Moreover, the regulatory presumption was an attempt by the Secretary to fill a gap left in the statute, which was never before the subject of any adverse precedent, and so the Secretary's litigation of this appeal was a good faith effort to interpret a matter of first impression before this Court.

Because the Secretary was substantially justified in all phases of the adjudication and litigation of these claims, 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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