THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

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

APPELLANT'S REPLY TO THE SECRETARY'S RESPONSE REGARDING APPELLANT'S APPLICATION FOR ATTORNEY'S FEES AND EXPENSES

The Secretary has not shown that his positions at the administrative and litigation stages were substantially justified.

Statement of the Case

VA sent Appellant a Statement of the Case (SOC) dated June 2, 2015. R. at 720-37. Accompanying the SOC was a notification letter that told Appellant he had to appeal the SOC within 60 days of the date on the notification letter. R. at 718 (718-19). The notification letter was undated, *id.*, so Appellant was confused about the deadline to file his Substantive Appeal, R. at 123 (121-37).

Appellant filed his Substantive Appeal on August 11, 2015, only 70 days after the June 2, 2015, date printed on the SOC. R. at 6 (1-8), 694. He asked VA to accept his appeal given that the notification letter was undated. *Id.* The VA Regional Office (RO) elected not to accept his Substantive Appeal as timely. R. at 680 (680-82). Appellant then filed a Notice of Disagreement, again asking VA to accept the Substantive Appeal as timely. R. at 676-77.

On October 6, 2016, VA sent a letter to Appellant. R. at 653 (653-54). VA stated, "The cover letter to the SOC was undated. We sincerely apologize for this oversight." *Id.*

Still, the RO again denied Appellant's Substantive Appeal as untimely in a December 2016 SOC, R. at 550 (541-51), and the Board of Veterans' Appeals (Board) did the same in July 2017, R. at 4 (1-8). Despite the Board's admission that "the undated transmittal letter confusingly" told Appellant he had 60 days from the missing date on the notification letter to file an appeal, the Board insisted that the mailing date presumption in § 20.302(b) must apply. R. at 5-6 (1-8). The Board also held Appellant responsible for not realizing that the restatement of § 20.302(b) on page 15 of the 18-page SOC "correctly clarifie[d]" the incorrect instructions VA gave Appellant on the undated notification letter. *Id.*

In briefings before the Court, Appellant argued, among other arguments, that VA was not entitled to the presumption of regularity in this case. Appellant's Br. 8-11. At oral argument, Appellant also argued that the mailing date presumption in § 20.302(b) should be invalidated because it did not ensure that claimants had 60 days to file Substantive Appeals, given that VA does not always mail the SOC on the date printed on the SOC. *See Crumlich v. Wilkie*, 31 Vet.App. 194, 199 (2019). In response, the Secretary conceded at oral argument that the date on the notification letter better reflects when an SOC is mailed. *See id.* at 204.

After oral argument, the Court ordered the Secretary to explain why the mailing date presumption in § 20.302(b) should not be invalidated. *See id.* at 200. Despite

acknowledging at oral argument that § 20.302(b) did not always give claimants 60 days from the date of mailing to appeal an SOC, the Secretary submitted a 16-page response arguing that the regulation should not be invalidated. Sec.'s Resp. Ct.'s Order.

In the Court's June 6, 2019, decision, the Court ruled in favor of Appellant for two reasons: 1) the Court invalided the mailing date presumption in § 20.302(b), and 2) VA could not rebut Appellant's argument that VA's mailing to Appellant was irregular. *Crumlich*, 31 Vet.App at 206. Judge Pietsch wrote a short concurrence:

> I write separately to record my frustration at the Secretary's refusal to waive the 60-day filing period in this case and allow the appellant's appeal to proceed. His decision to take a hard line even though he mailed the appellant an incorrect, improperly prepared, and plainly misleading notice letter caused a lot of resources to be wasted—not the least the appellant's time—all to receive a decision that costs VA the use of a regulation. If the paternalistic nature of VA is to be more than mere platitude, cases like this should be handled in a more empathetic manner.

Id. at 207 (Pietsch, J., concurring).

The Secretary now extends the case, arguing that Appellant's attorney is not entitled to EAJA fees because the Secretary was substantially justified in his position at the administrative and litigation stages. Sec.'s Resp. to Appellant's Appl. Att'y's Fees and Expenses 5-6.

Rebuttal Argument

When an appellant alleges that the Secretary's position was not substantially justified, the Secretary "has the burden of proving that [his] position was substantially justified . . . at both the administrative (BVA) and litigation (in this Court) stages." *Vaughn v. Gober*, 14 Vet.App. 92, 95 (2000) (citations omitted). Further, "in a case in which the Secretary's regulation has been invalidated," the Secretary must also prove substantial justification in promulgating the regulation. *Ozer v. Principi*, 16 Vet.App. 475, 477 (2002) (per curiam).

Substantial justification is shown 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 n.2 (1988). When determining substantial justification, this Court "must focus on 'the totality of 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). Thus, the Secretary's position is not reasonable simply because the issue was one of first impression or that he followed a policy that went unchallenged for years. *Felton v. Brown*, 7 Vet.App. 276, 281 (1994). Instead, the Secretary must show on the whole that he was substantially justified based on factors that include "the 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 in the filings of the parties before the Court." *Stillwell v. Brown*, 6 Vet.App. 291, 302 (1994).

Further, in cases of first impression, the Court "must determine whether the issue presented 'close' questions, and whether the Secretary sought an unreasonable interpretation or resolution of the matter." *Gordon v. Peake*, 22 Vet.App. 265, 269 (2008) (citations omitted). Other factors to consider include whether "the statutory scheme to be considered is complex" or "the analysis required, even for a straightforward statute, is exceptional." *Id.* (citations and quotations omitted).

I. The Secretary Was Not Substantially Justified in Promulgating the Mailing Date Presumption in 38 C.F.R. § 20.302(b).

The Secretary has not shown in both law and fact that a reasonable person would find that the mailing date presumption in § 20.302(b) was reasonably promulgated.

The Secretary argues that he was substantially justified in promulgating the mailing date presumption because it "provided a means by which to determine when a claimant had been provided with a[n SOC], so as to attempt to provide each claimant with the statutorily mandated 60[-]day period to perfect his or her appeal." Sec.'s Resp. 5. His argument fails, though, because it directly contradicts the Court's finding as to the regulation's actual purpose:

> VA invokes the regulatory presumption only when that clear evidence [of the mailing date] is absent. This, in turn, leads to the conclusion that *the regulatory presumption is not applied to ensure that all claimants receive 60 days* from the date the SOC "is mailed" to file a Substantive Appeal. 38 U.S.C. § 7105(d)(3). Rather, *it is applied to shield VA* in the event that it is unknown to the Agency whether the claimant received the statutorily mandated time to perfect his or her appeal. In other

> words, it may absolve VA of responsibility for issuing an undated SOC cover letter.

Crumlich, 31 Vet.App. at 204 (emphasis added). Knowing its internal processes, VA could have promulgated a regulation that ensured claimants would have the statutorily mandated 60-day period to file a Substantive Appeal. Instead, VA unreasonably promulgated a regulation that protected VA whenever it failed to date notification letters.

The Secretary's only remaining argument is that he believes this case is "indistinguishable" from *Felton*. Sec.'s Response 8-10. His argument fails, though, because he asks the Court to apply a per se rule that the Court rejected in *Felton*. The Secretary argues that in *Felton* the Secretary's promulgation of a regulation was substantially justified—even though it was inconsistent with the authorizing statute—because it filled a "gap in the statute" and did not conflict with adverse precedent. *Id.* at 8-9. The Secretary then states that the mailing date presumption filled a statutory gap and did not conflict with adverse precedent; thus, "precedent clearly indicates that the Secretary was substantially justified in his promulgation of the regulation at issue in this case." *Id.* at 9-10. In *Felton*, though, this Court explicitly stated that it did not create a per se rule. *Felton*, 7 Vet.App. at 35-36 ("What we have done is carefully craft an approach that avoids per se rules at either extreme . . . ."). Instead, this Court stated that "while other cases may serve as guiding lights, ultimately, *each case must find its own path* upon the stormy EAJA seas." *Id.* at 35 (emphasis added). By simply

pointing to a potentially similar situation in *Felton*, the Secretary has not proven that the regulation *at issue here* was reasonably promulgated in both law and fact.

Further, the Secretary relies on *Ozer*, given that it "squarely followed the guidance of the Court in *Felton* to find that the Secretary was substantially justified in promulgating the regulation." Sec.'s Resp. 9. The Court succinctly stated in *Ozer* that it could not find a "meaningful distinction" between *Ozer* and *Felton* and that the "essence of the merits" were the same: "The regulation contravened the plain language of the statute and thus was invalid." 16 Vet.App. at 478. The Secretary essentially contends, then, that *Ozer* applied a per se rule that *Felton* did not create, and he asks the Court to do the same here. But *Felton* was clear that it did not create a per se rule, and *Ozer* should be overturned to the extent that it adopted a per se rule from *Felton*. *See Ozer*, 16 Vet.App. at 480 (continuing to disapprove of *Felton*'s holding and analysis) (Steinberg, J., concurring); *Felton*, 7 Vet.App. at 40 ("Analysis of the underlying Court opinion suggests that the majority is headed toward a rule that no EAJA award is permissible whenever the Court's holding on the law in the underlying merits decision was a matter of first impression for this Court.") (Steinberg, J., dissenting).

In addition to asking the Court to apply a per se rule, the Secretary excludes important analysis that distinguishes *Felton* from this case. In *Felton*, the Court carefully analyzed the regulation's history. *Id.* at 25-29. It concluded that "the regulation was premised on a [VA General Counsel] precedential opinion that attempted to distinguish a prior [VA General Counsel] precedential opinion that, in

turn, had tried to interpret a gap in a statute and a VA regulation." *Id.* at 28-29. That complex history was part of the reason the Court found that the Secretary was substantially justified in promulgating a regulation that contravened the authorizing statute. *See id.* Here, as Appellant noted in his Supplemental Memorandum of Law, there is no complex history preceding the promulgation of the mailing date presumption. *See* Suppl. Mem. Law 5-6. VA added the presumption after it received one comment suggesting that VA define the phrase "date of mailing," 48 Fed. Reg. 6,961, 6,964 (Feb. 17, 1983), and VA has never explained its reasoning for the language it chose, see 57 Fed. Reg. 4,088, 4,093 (Feb. 3, 1992); 54 Fed. Reg. 34,334, 34,336 (Aug. 18, 1989); 48 Fed. Reg. at 6,964. Thus, there was no complex history preceding the promulgation of this regulation. VA simply promulgated a regulation that it knew would sometimes prevent claimants from receiving 60 days to appeal an SOC.

Further, the statutory scheme was not complex here so that a reasonable person could understand why VA might promulgate a regulation that contradicts its authorizing statute. 38 U.S.C. § 7105(d)(3) simply requires VA to give claimants 60 days to file a Substantive Appeal. Knowing its practices, VA could have taken that simple direction and written a regulation that always provides 60 days to appeal. It did not do so.

In sum, the Secretary has not met his burden to show that the Secretary was substantially justified in promulgating the mailing date presumption in § 20.302(b).

II. The Board of Veterans' Appeals Was Not Substantially Justified in Relying on the Mailing Date Presumption to Deny Appellant's Substantive Appeal as Untimely.

The Secretary has not shown in both law and fact that a reasonable person would find that the Board reasonably relied on the mailing date presumption in § 20.302(b) to deny Appellant's Substantive Appeal as untimely.

The Secretary argues that the Board was "bound by law" to deny Appellant's Substantive Appeal as untimely. Sec.'s Resp. 10. While the mailing date presumption may have required the Board to determine that the mailing date was June 2, 2015, no binding law required the Board to deny Appellant's appeal as untimely. In fact, although 38 U.S.C. § 7105(d)(3) provides that claimants should file an appeal within 60 days of the SOC, it "explicitly allow[s] the Board to adjudicate matters for which the claimant has failed to file a timely Substantive Appeal." *Percy v. Shinseki*, 23 Vet.App. 37, 44-45 (2009); *see also* Oral Argument at 35:57-36:20 (Secretary conceding that under *Percy* the Board can waive the 60-day period). At most, the Board reasonably used the presumption to determine the SOC's mailing date; it does not follow, though, that it reasonably denied Appellant's Substantive Appeal as untimely because it was "bound by law" to do so.

Given that the Board was not "bound by law" to deny the Substantive Appeal as untimely, the facts show that the Board unreasonably refused to accept Appellant's Substantive Appeal as timely. VA failed to date the notification letter, which explicitly told Appellant to file a Substantive Appeal within 60 days of the date on the notification letter. VA even admitted fault when it "sincerely apologized" for not

dating the notification letter. Further, Appellant submitted his Substantive Appeal only ten days after the deadline created by § 20.302(b). Any reasonable person charged with carrying out VA's paternalistic mission; who had the legal power to accept Appellant's Substantive Appeal regardless of when he filed the Substantive Appeal; and who knew that Appellant had received "an incorrect, improperly prepared, and plainly misleading notice" would have accepted the Substantive Appeal as timely. *See Crumlich*, 31 Vet.App. at 207 (Pietsch, J., concurring). Stated differently, as Chief Judge Davis did at oral argument, nothing required the Board to accept the appeal as timely "other than good common sense." Oral Argument at 37:53-38:23.

It is also relevant that the only underlying issue before the Board was whether Appellant would receive five years of back pay. R. 2 (1-8); *see also* Oral Argument at 37:53-38:23. While Appellant was litigating the timeliness of his Substantive Appeal, VA service connected PTSD at 50% and a back condition at 10% effective April 25, 2016. R. at 162 (162-65). Thus, in its decision, the Board decided to not to grant a veteran five years of back pay, even though he had already proven that he was entitled to the benefits.

In sum, the Secretary has not met his burden to show that the Board was substantially justified in denying Appellant’s Substantive Appeal as untimely.

III. The Secretary Was Not Substantially Justified in His Litigation Position before this Court.

The Secretary has not shown in both law and fact that a reasonable person would litigate his positions before the Court.

The Secretary argues that his position to defend the mailing date presumption was "a good faith effort to adjudicate an issue of first impression before this Court." Sec.'s Resp. 12. While the Secretary can make reasonable, good faith arguments in support of a regulation that is later invalidated, *Felton*, 7 Vet.App. at 281, he did not do so here. When pressed at oral argument about the application of the presumption, the Secretary conceded that it does not always ensure that claimants receive the statutorily mandated 60-day appeal period. *See Crumlich*, 31 Vet.App. at 204. Consequently, a reasonable person acting in good faith would concede that § 20.302(b)'s mailing date presumption conflicts with its authorizing statute. Instead, the Secretary defended the validity of the presumption at oral argument and in his 16-page response.

The Secretary also argues that his litigation position was reasonable because Appellant did not argue that the presumption should be invalidated until oral argument. Sec.'s Resp. 12-13. To the extent that the Secretary implicitly suggests that he would not have pursued litigation had Appellant presented the argument earlier, the Secretary's response to the Court's order belies that suggestion. Further, the Secretary suggests that the Court's decision to invalidate the presumption was the only controlling issue in the case. *Id.* While the invalidation of the presumption

was integral to the Court's decision, Appellant would not have won unless the Court also decided that the presumption of regularity did not apply. *See Crumlich*, 31 Vet.App. at 205-06. Appellant consistently advocated throughout litigation that the presumption of regularity did not apply. Thus, Appellant won the case in part because of an issue he had been advocating from the beginning of litigation.

In sum, the Secretary has not met his burden to show that his litigation position before this Court was substantially justified.

Conclusion

Appellant respectfully asks the Court to grant his request for EAJA fees because the Secretary has not shown that his positions at the administrative and litigation stages were substantially justified.

Dated: December 30, 2019.

Respectfully submitted,

/s/ Timothy R. Franklin

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