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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 17-2630(E)

MATTHEW W. CRUMLICH, APPELLANT,

V.

ROBERT L. WILKIE,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before MEREDITH, *Judge*.

O R D E R

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

Pending before the Court is appellant Matthew W. Crumlich's September 24, 2019, application pursuant to the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d), for an award of attorney fees and expenses in the amount of $16,924.58. The Court has jurisdiction pursuant to 28 U.S.C. § 2412(d)(2)(F) to award reasonable attorney fees and expenses. Single-judge disposition is appropriate. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the reasons that follow, the Court will grant the EAJA application in full.

I. BACKGROUND

On August 14, 2017, the appellant filed an appeal from a July 31, 2017, Board of Veterans' Appeals (Board) decision that found that he had not filed a timely Substantive Appeal regarding an August 2013 VA regional office decision. The matter was referred to a panel of the Court, which held oral argument on January 15, 2019. The panel issued an opinion on June 6, 2019, setting aside the Board's finding that the appellant's Substantive Appeal was untimely and remanding the matter for the Board to address two factual questions. *Crumlich v. Wilkie*, 31 Vet.App. 194 (2019). In its opinion, the Court invalidated that part of 38 C.F.R. § 20.302(b)(1) that created a presumption that the date of mailing of a Statement of the Case (SOC) is the date listed on the SOC itself. *Id.* at 203-04.

The appellant filed his EAJA application in September 2019, seeking attorney fees in the amount of $16,268.75 and expenses totaling $655.83. EAJA Application at 1, 14. Several months later, the Secretary responded, arguing only that he was substantially justified in promulgating § 20.302(b)(1) and that his position at both the administrative and litigation stages was also substantially justified. Secretary's Response at 6-13. The Secretary disputes no other aspects of

the appellant's EAJA application. In reply, the appellant argues that the Secretary's position was not substantially justified at any time. Appellant's Reply at 5-12.

II. ANALYSIS

A. Law

EAJA is a fee-shifting statute that provides for reimbursement of prevailing parties in certain civil actions against the United States for "reasonable attorney fees." 28 U.S.C. § 2412(d)(2)(A). Pursuant to 28 U.S.C. § 2412(d)(1)(B), a party seeking an award of fees and other expenses must submit an application within 30 days after final judgment that includes the following: (1) A showing that the applicant is a "prevailing party"; (2) a showing that the applicant is "eligible to receive an award"; (3) a statement of "the amount sought, including an itemized statement from any attorney . . . stating the actual time expended and the rate"; and (4) an allegation that the position of the United States was "not substantially justified."

In this case, the appellant filed his EAJA application within the 30-day time period set forth in section 2412(d)(1)(B). *See Scarborough v. Principi*, 541 U.S. 401, 408 (2004). Because the Secretary contests only the appellant's assertion that his position was not substantially justified, the Court will address only that matter. *See* 28 U.S.C. § 2412(d)(1)(B).

Where a party alleges that the Secretary's position was not substantially justified, the burden shifts to the Secretary to prove substantial justification. *Stillwell v. Brown*, 6 Vet.App. 291, 301 (1994). "The Secretary's position is 'substantially justified' when it is founded upon a 'reasonable basis in both law and fact.'" *Dixon v. O'Rourke*, 30 Vet.App. 113, 118 (2018) (per curiam order) (quoting *Pierce v. Underwood*, 487 U.S. 552, 564 (1988)). "In order to prevail, the Secretary must show substantial justification for both his administrative and litigation positions." *Locher v. Brown*, 9 Vet.App. 535, 537 (1996). Additionally, where the Court invalidates the Secretary's regulation, "the Secretary must prove substantial justification . . . in promulgating the regulation." *Ozer v. Principi*, 16 Vet.App. 475, 477 (2002) (per curiam order) (citing *Felton v. Brown*, 7 Vet.App. 276, 283 (1994)).

"The mere existence of a duly promulgated regulation does not render an agency's position substantially justified." *Felton*, 7 Vet.App. at 282. Nor does a Court decision invalidating a regulation necessarily render the Secretary's position not substantially justified. *Id.* at 280. Moreover, the Court has declined to adopt a "per se rule that a case of first impression will always render the Government's position substantially justified." *Id.* at 281. Instead, the Court must determine whether the Government's position was "'justified in substance or in the main'—that is, justified to a degree that could satisfy a reasonable person." *Id.* (quoting *Underwood*, 487 U.S. at 565).

"[T]he substantial justification inquiry requires an analysis of 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). Although there is no exhaustive list of relevant factors, this Court has outlined the pertinent considerations: "[M]erits, conduct, reasons given, [ ] 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." *Stillwell*, 6 Vet.App. at 302.

B. Discussion

"[W]hen assessing whether to award attorney fees incurred by a party who successfully challenged a governmental action, the entirety of the conduct of the government is to be analyzed, both the government's litigation position and the action or inaction by the agency prior to the litigation." *Stillwell*, 6 Vet.App. at 302 (citing Pub. L. No. 99-80, § 2(b), 99 Stat. 184-185 (Aug. 5, 1985) (codified at 28 U.S.C. § 2412(d)(1)(B))). With respect to the Agency's position at the administrative stage, the Court evaluates "the reasonableness of 'the underlying government action at issue.'" *Felton*, 7 Vet.App. at 280 (quoting *Wilderness Soc'y v. Babbitt*, 5 F.3d 383, 388 (9th Cir. 1993)). "[T]he Government's prelitigation conduct . . . could be sufficiently unreasonable by itself to render the entire Government position not substantially justified." *Healey v. Leavitt*, 485 F.3d 63, 67 (2d Cir. 2007) (internal citations and quotations omitted)); *see Butts v. McDonald*, 28 Vet.App. 74, 82 (2016) (en banc) (relying on *Healey*).

As the Court noted in the underlying decision, the Secretary made numerous concessions that suggest that his actions at the administrative stage were unreasonable. Among those concessions were that (1) in practice, notification letters are sometimes dated later than the date listed on the SOC; (2) where a notification letter is dated later than the SOC, there is clear evidence that the SOC was not mailed on the date listed on the SOC (as the presumption in § 20.302(b)(1) provides); (3) where a notification letter is dated later than the date on the SOC, the claimant must be given 60 days from the date of the letter to file a Substantive Appeal; (4) the notification letter that the appellant received was undated; and (5) VA had no information about when the SOC in this case was actually mailed or received. *Crumlich*, 31 Vet.App. at 204. The Court further found that, assuming the Secretary has a regular procedure for dating and mailing SOCs, that procedure was not followed in this case. *Id.* at 205. Additionally, the Court noted that the Board found that "the cover letter itself 'confusingly' indicates that it is dated, but it is not." *Id.* (quoting Record at 5-6). As to § 20.302(b)(1), the Court concluded that, in practice, the regulatory presumption was used not to protect the appellate rights of claimants but, rather, "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." *Id.* at 204.

The underlying decision reflects that, ordinarily, had the Board waived the 60-day period to file the August 2015 Substantive Appeal, *see Percy v. Shinseki*, 23 Vet.App. 37, 44-45 (2009), or found that Substantive Appeal timely,[1] it would simply have had to consider the appellant's claims for benefits on the merits. *Id.* at 197 n.2. However, in this case, the appellant's claims were granted and an effective date of April 2016 assigned (based on a reopened claim) while his appeal of the timeliness of the August 2015 Substantive Appeal was pending before the Board; accordingly, a reversal of the timeliness determination could result in an effective date as early as November 2011. *Id.* Further, the Court noted that, in the decision on appeal, the Board had remanded the issue of entitlement to an effective date earlier than April 2016. *Id.* at 196 n.1.

[1] The Court notes that the appellant's Substantive Appeal was submitted 68 days after the date listed on the SOC. *See Crumlich*, 31 Vet.App. at 197-98.

Finally, the concurring judge in the underlying case wrote that the Secretary's "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." *Id.* at 207 (Pietsch, J., concurring).

On the other hand, one factor that may weigh in favor of finding substantial justification at the administrative stage is that the Board was applying a duly promulgated regulation that had not yet been challenged as invalid. *See Ozer v. Principi*, 16 Vet.App. 475, 478 (2002) (per curiam order) (citing *Fugere v. Derwinski*, 1 Vet.App. 103, 110 (1990) (holding that an agency is bound by its regulations)); *Felton*, 7 Vet.App. at 284 (finding the Secretary's position substantially justified in part based on "the lack of conflict with adverse precedent"). Although that factor is important, considering the totality of the circumstances, the Court holds that the Board's decision to apply the Secretary's then-valid regulation in this instance is outweighed by VA's failure to ensure that a regular procedure for mailing SOCs, if one exists, was followed in this case; by the Board's and the Secretary's invocation of the regulatory presumption to shield the Agency rather than to protect the appellate rights of the claimant; and by the Secretary's concession at oral argument that the notification letter in this case was undated and there was no evidence of when VA actually mailed the SOC or when the appellant actually received it. *See Butts*, 28 Vet.App. at 87.

Having found the Secretary's position at the administrative stage of proceedings in this case not substantially justified, the Court need not consider whether he was substantially justified in promulgating former § 20.302(b)(1) or at the litigation stage. *See Locher*, 9 Vet.App. at 537 ("[T]o prevail, the Secretary must show substantial justification for both his administrative and litigation positions."). Further, because the Secretary does not challenge any other aspect of the appellant's application, *see* Secretary's Response at 1-14, and because the appellant's request for attorney fees and expenses is not unreasonable on its face, *see Chesser v. West*, 11 Vet.App. 497, 501-02 (1988), the Court will grant his EAJA application in full.

Upon consideration of the foregoing, it is

ORDERED that the appellant's EAJA application is GRANTED in full, in the amount of $16,924.58.

DATED: February 18, 2020

BY THE COURT:

AMANDA L. MEREDITH
Judge

Copies to:

Timothy R. Franklin, Esq.

VA General Counsel (027)