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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 15-4082(E)

ALFRED PROCOPIO, JR., APPELLANT,

v.

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

Before PIETSCH, *Judge*.

MEMORANDUM DECISION

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

PIETSCH, *Judge*: Before the Court is Alfred Procopio Jr.'s October 1, 2019, application for an award of \$8,930.00 in attorney fees and expenses pursuant to the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d). For the reasons set forth below, the Court will dismiss Mr. Procopio's EAJA application.

I. FACTS

On October 26, 2015, Mr. Procopio appealed a July 9, 2015, Board of Veterans' Appeals (Board) decision to the Court. The Court affirmed the Board's decision on November 18, 2016. Mr. Procopio appealed the matter to the U.S. Court of Appeals for the Federal Circuit (Federal Circuit), which reversed this Court's November 2016 decision and remanded the case. Pursuant to the Federal Circuit's decision, the Court vacated its November 2016 Board decision on appeal in a July 2019 decision, remanding the case.

On October 1, 2019, Mr. Procopio sought fees and expenses pursuant to EAJA. In a December 2019 response, the Secretary argued that Mr. Procopio's application should be denied because the Federal Circuit had already denied his EAJA application filed at that court after finding the Secretary's position was substantially justified. In response, Mr. Procopio acknowledges that

his application has been denied by the Federal Circuit and concedes that he believes that the law of the case doctrine controls. He, therefore, states that he is withdrawing his EAJA application.

II. ANALYSIS

To establish eligibility for an EAJA award, an appellant's application must be filed within 30 days after final judgment and contain (1) a showing that the appellant is a prevailing party, (2) an assertion that the appellant's net worth does not exceed \$2,000,000, (3) an allegation that the Secretary's position was not substantially justified, and (4) an itemized statement of the fees and expenses sought. *See* 28 U.S.C. § 2412(d)(1)(A), (1)(B), (2)(B); *Scarborough v. Principi*, 541 U.S. 401, 407-08 (2004); *Owens v. Brown*, 10 Vet.App. 65, 66 (1997).

As the parties acknowledge, the Federal Circuit has found that the Secretary's position in the underlying appeal was substantially justified and that Mr. Procopio was not entitled to EAJA fees. The Court agrees with the parties that the law of the case doctrine controls the outcome of this matter. *See Browder v. Brown*, 5 Vet.App. 268, 270 (1993) ("Under the doctrine of 'law of the case,' questions settled on a former appeal of the same case are no longer open for review."); *McCall v. Brown*, 6 Vet.App. 215, 216 (1994) ("Under the *law of the case doctrine*, courts generally will not review or reconsider issues which already have been decided in a previous appeal."). Accordingly, the Court will accept Mr. Procopio's request to withdraw his EAJA application and will dismiss this matter.

III. CONCLUSION

Upon consideration of the foregoing analysis, the Court will DISMISS Mr. Procopio's application for fees and expenses under EAJA.

DATED: December 30, 2020

Copies to:

John B. Wells, Esq.

VA General Counsel (027)