IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

ROBERT M. EUZEBIO,	)	
	)	
Appellant,	)	
	)	
v.	)	Vet. App. No. 17-2879 (E)
	)	
DENIS McDONOUGH,	)	
Secretary of Veterans Affairs,	)	
	)	
Appellee.	)	

SECRETARY'S RESPONSE UNDER U.S. VET. APP. R. 39(a) TO APPELLANT'S APPLICATION FOR ATTORNEY FEES AND EXPENSES

ISSUES PRESENTED

Whether Appellant's application for an award of attorney's fees and expenses under the Equal Access to Justice Act (EAJA) should be denied because Appellant fails to show that he was the prevailing party and the Secretary's was position was substantially justified where this Court ruled in his favor on the merits and the United States Court of Appeals for the Federal Circuit vacated and remanded the judgment of Court.

RELEVANT BACKGROUND

Appellant seeks EAJA fees and expenses totaling $78,333.00, in connection with his appeal of a July 20, 2017, Board of Veterans' Appeal (Board) decision that denied entitlement to disability compensation for benign thyroid nodules, including as due to exposure to herbicide agents or contaminated water at Camp Lejeune on presumptive and direct bases. The Court, in a precedential panel decision, affirmed the Board's decision. One of the issues raised in the briefs, and addressed by the Court's decision, was whether the National Academies of

Sciences, Engineering & Medicine's (NAS's) report, *Veterans and Agent Orange: Update 2014* (2014 Update) was constructively before the Board such that it had an obligation to address the report as part of its analysis under *McLendon v. Nicholson,* 20 Vet.App. 79 (2006). The Court held that even if the Department of Veterans Affairs is aware of a report and the report contains general information about the type of disability on appeal, that is insufficient to trigger the constructive possession doctrine; there must also be a direct relationship to the claim on appeal. *Euzebio v. Wilkie*, 31 Vet.App. 394, 402 (2019). The Court held that 2014 Update was not constructively before the Board when it denied entitlement to disability compensation for benign thyroid nodules and that consequently the Board was not required to consider the 2014 Update under its *McLendon* analysis. *Euzebio,* 31 Vet.App. at 396-412.

Appellant appealed the Court's panel decision to the United States Court of Appeals for the Federal Circuit (Federal Circuit). The Federal Circuit vacated this Court's August 2019 decision and remanded the matter for further proceedings. The Federal Circuit held that the "direct relationship" was an erroneous legal standard, and that relevance and reasonableness were the correct standards. *Euzebio v. McDonough*, 989 F.3d 1305, 1321 (Fed. Cir. 2021). The Federal Circuit remanded the case for the Court to decide whether the Board had constructive possession of the Update 2014 under the legal standard it described. *Euzebio*, 989 F.3d. at 1324.

On remand from the Federal Circuit, this Court, in a May 2021 memorandum decision, found that the Update 2014 "'reasonably connected' to appellant's claim under the Federal Circuit's test and therefore relevant because it provides scientific proof of Agent Orange's impact on the thyroid." *Euzebio v. McDonough*, No. 17-2879, 2021 U.S. App. Vet. Claims LEXIS 928, at *7 (Vet. App. May 26, 2021). The Court concluded that was sufficient to establish that the Update 2014 was constructively before the Board at the time of its July 2017 decision. *Id.* The Court remanded the matter for the Board to determine whether the Update 2014 was sufficient to satisfy the test outlined in *McLendon* when determining whether a medical examination was required. *Id.*

On August 18, 2021, the Court docketed Appellant's application for attorney fees and expenses. (EAJA App.). His EAJA application lists a total of 378.3 hours of work performed on this case done by twelve attorneys for $76,667.54. *See* EAJA App. at 5-10, and attached invoice (Inv.). He also seeks $1,665.12 in expenses. EAJA App. at 9-10. His EAJA application does not show a voluntary reduction in the interests of billing judgment. *See, generally*, EAJA App. Inv. Thus, he seeks a total of $78,333.00 for fees and expenses.

SUMMARY OF THE ARGUMENT

The Court should deny Appellant's EAJA application because Appellant is not a prevailing party and the Secretary's position in both the administrative and litigation stages was substantially justified.

Appellant is not a prevailing party just because he obtained an order vacating and remanding the July 20, 2017, Board decision. An appellant will not be a prevailing party if the remand is based solely on a change in judicially created law that occurred after the Board issued the decision being appeal to the Court.

The Secretary was substantially justified in his actions adjudicating the case and litigating the appeal. At the administrative stage, the Board was substantially justified because its decision was consistent with then-current law. At the litigation stage, the Secretary was also substantially justified because his position was consistent with current case law. The Court accepted as correct the Secretary's litigation and administrative positions when it affirmed the Board's decision.

ARGUMENT

The Court should find that Appellant is not the prevailing party for EAJA purposes and that the Secretary's positions at the administrative and litigation levels were substantially justified, so it should deny Appellant's application.

Appellant must meet the three predicate findings for an EAJA award: (1) Appellant is a "prevailing party"; (2) the Secretary's position was not "substantially justified"; and (3) there are no "special circumstances" which would make an award unjust. 28 U.S.C. § 2412(d).[1] The Secretary asserts that the Court should deny

[1] The Secretary concedes that the Court has jurisdiction over this matter pursuant to 38 U.S.C. § 7261(a)(1) and 28 U.S.C. § 2412(d)(2)(F). Moreover, Appellant's application for fees and expenses satisfies the jurisdictional requirements of 28 U.S.C. § 2412. Finally, the Secretary waives any defense regarding whether there are special circumstances that would make an award unjust. *See* 28 U.S.C. § 2412(d).

Appellant's EAJA application because he does not meet the first two predicate findings as Appellant was not the prevailing party and the Secretary's position was substantially justified.

A. Appellant's Application for an award of attorney fees and expenses under the EAJA should denied as Appellant lacks status as the prevailing party

The Court should deny Appellant's application for fees and expenses because he is not a prevailing party for EAJA purposes. To receive an EAJA award, an EAJA applicant must be a prevailing party. *See* 28 U.S.C. § 2412(d)(1)(A) (providing that "a court shall award to a prevailing party . . . fees and other expenses"). The applicant has the burden of demonstrating prevailing-party status under the EAJA. *Johnson (Leamon) v. Principi*, 17 Vet.App. 436, 439 (2004). A prevailing party is one who receives "at least some relief on the merits of his claim." *Sumner v. Principi,* 15 Vet.App. 256, 261 (2001) (en banc) (quoting *Buckhannon Bd. and Care Home, Inc. v. W. Va. Dep't of Health and Human Res.,* 532 U.S. 598, 603 (2001)). This Court has held that "[p]revailing party status requires either (1) the ultimate receipt of a benefit that was sought in bringing the litigation . . . or (2) a court remand predicated upon administrative error." *Zuberi v. Nicholson,* 19 Vet.App. 541, 544 (2006) (citing *Sumner,* 15 Vet.App. at 264). A remand is predicated on administrative error when the remand has been either "directed in a Court opinion, decision, or order that contained a Court recognition of administrative error," or "granted on the basis of a concession of error by the Secretary." *Gordon,* 17 Vet.App. at 223.

Appellant is not a prevailing party just because he obtained an order vacating and remanding the July 20, 2017, Board decision. "A remand to an administrative agency for additional proceedings may confer prevailing-party status upon a litigant, but only if the remand is predicated—either explicitly or implicitly—on administrative error." *Conley v. Wilkie*, 30 Vet.App. 224, 226 (2018) (internal quotations omitted). The change in law that occurred in this case was subsequent to the Board's decision when the Federal Circuit vacated this Court's decision. The Secretary relied on well-established case law explaining the constructive possession doctrine that culminated in the direct relationship test described in *Monzingo v. Shinseki*, 26 Vet.App. 97, 102 (2012) (per curiam) and recently noted with approval in *Lang v. Wilkie*, 971 F.3d 1348, 1353 (Fed. Cir. 2020).

The Federal Circuit changed the law by effectively overruling *Monzingo.* It vacated and remanded this Court's August 2019 decision, holding that the "direct relationship" was an erroneous legal standard, and that relevance and reasonableness were the correct standards. *Euzebio*, 989 F.3d at 1321. Thus, until the Federal Circuit issued its decision, this Court's case law held that the reasonable expectation element of the constructive possession doctrine included a direct relationship requirement. That analysis is now inapplicable, and the Federal Circuit has held that relevance and reasonableness are the determinative factors when determining whether a document was constructively before the

Board. The Federal Circuit's holding is a departure from the state of the law that existed before the issuance of that court's opinion.

On remand from the Federal Circuit, this Court, in a May 2021 memorandum decision, vacated and remanded the Board's decision because it failed to provide an adequate statement of reasons of bases for its conclusions that a VA examination was unnecessary and its duty to assist was satisfied. While the basis of the Court's decision to vacate and remand the Board's June 2017 decision implicates administrative error, the Court arrived this decision only after the Federal Circuit significantly revised the judicially created doctrine of constructive possession. *See Bates v. Nicholson*, 20 Vet.App. 185, 190 (2006), citing *Akers*, 409 F.3d 1356, 1359 (2005) (concluding that remands based solely on the passage of a statute or intervening caselaw did not confer prevailing-party status). The Secretary respectfully argues that administrative error really is not at play here because the Federal Circuit overturned the well-established interpretation of a judicially created legal construct. As the Court noted in *Akers*, "[a] boxer thrown out of the ring and then allowed back in to continue the fight has not prevailed . . . ." *Akers*, 409 F.3d at 1360.

B. Appellant's Application for an award of attorney fees and expenses under the EAJA should be denied because the Secretary's position was Substantially justified

The Court should deny Appellant's application for fees and expenses because the Secretary was substantially justified both at the adjudication and litigation stages of this case. It is well settled that "a court shall award to a

prevailing party . . . fees and other expenses . . . incurred by that party in any civil action . . . , including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the . . . *the position of the United States was substantially justified*." 28 U.S.C. § 2412(d)(1)(A) (emphasis added). The Secretary's position was substantially justified because, although the United States Court of Appeals for the Federal Circuit vacated and remanded the Court's judgment, the Court initially affirmed the Board's decision, and both the administrative and litigation positions of the Secretary could therefore satisfy a reasonable person.

Substantial justification means that the Secretary's position was "'justified in substance or in the main' – that is, justified to a degree that could satisfy a reasonable person," meaning it has a reasonable basis in both law and fact. *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). "'Put another way, substantially justified means there is a dispute over which reasonable minds could differ.'" See *Cline v. Shinseki*, 26 Vet.App. 325, 327 (2013) quoting *Norris v. S.E.C.*, 695 F.3d 1261, 1265 (Fed. Cir. 2012) (quoting *Gonzalez v. Free Speech Coal.*, 408 F.3d 613, 618 (9th Cir. 2005)).

"Substantially justified" does not necessarily mean that the government's position was correct. *Pierce*, 487 U.S. at 566 n. 2. The "substantially justified" standard "does not 'raise a presumption that the Government position was not justified, simply because it lost the case.'" *Norris v. SEC*, 695 F.3d 1261, 1265 (Fed. Cir. 2012) (quoting *Broad Ave. Laundry & Tailoring v. United States*, 693

F.2d 1387, 1391 (Fed. Cir. 1982)). Nor does the government's position have to be "correct" or even "justified to a high degree." *Id*. In determining substantial justification, the Court considers the clarity of governing law concerning the government's position in the underlying agency action, as well as arguments during the litigation itself. *Id*. In determining substantial justification, the Court's inquiry must focus on the "totality of the circumstances" pertinent to the Government's position on the issue on which the claimant prevailed, including the "state of the law at the time the position was taken." *Lacey v. Wilkie*, 32 Vet.App. 387, 390 (2020), quoting *Smith v. Principi*, 343 F.3d 1358, 1363 (Fed. Cir. 2003).

In this case, there has been no showing that the Government's position at either the agency level or the litigation level did not have a reasonable basis in law and fact when it was taken. *See Stillwell v. Brown,* 6 Vet.App. 291, 302 (1994) (The Secretary's position is substantially justified "'if a reasonable person could think it correct, that is, if it has a reasonable basis in law and fact.'"). This Court further explained substantial justification in *Moore v. Gober*, 10 Vet.App. 436 (1997). In *Moore*, the Court held that in order "[t]o determine whether the Secretary's position was 'reasonable' during the administrative proceedings, the Court looks to the relevant determinative circumstances, including the state of the law at the time of the BVA decision." *Id*. at 440 (citing *Bowyer v. Brown*, 7 Vet.App. 549, 552 (1995)). The Secretary's position was substantially justified at the administrative stage when the Board applied the law in effect at the time of its decision. On appeal to the Court, it accepted as correct the Secretary's litigation

and administrative positions when it affirmed the Board's decision. *See Euzebio v. Wilkie*, 31 Vet.App. 394. As noted earlier, the Secretary relied on well-established case law explaining the judicially created doctrine of constructive possession in *Monzingo v. Shinseki*, 26 Vet.App. 97, 102 (2012) (per curiam) and reaffirmed in *Lang v. Wilkie*, 971 F.3d 1348, 1353 (Fed. Cir. 2020).

That is, the "substantially justified" inquiry focuses "on the circumstances pertinent to the position taken by the government . . . such as the state of the law at the time the position was taken." *Smith v. Principi*, 343 F.3d 1358, 1363 (Fed. Cir. 2003). In *Owen v. United States*, the government argued that, "since it relied on [Federal Circuit] precedents which were overturned en banc, its position until then was substantially justified and reasonable." 861 F.2d 1273, 1274 (Fed. Cir. 1988) (en banc). The court agreed, holding en banc, that the government's reliance on binding precedent "alone is sufficient for the motion to fail under the EAJA . . . ." *Id.; see id*. at 1275 (reiterating that "the position of the government was substantially justified when it was taken, based on precedents then standing."). This means that "substantial justification is measured, not against the case law existing at the time the EAJA motion is decided, but rather, against the case law that was prevailing at the time the government adopted its position." *Bowey v. West*, 218 F.3d 1373, 1377 (Fed. Cir. 2000); *Pierce v. Underwood*, 487 U.S. 552, 561 (1988) (explaining that the question is "not what the law now is, but what the Government was substantially justified in believing it to have been.").

"The Federal Circuit [has] instructed that '[t]he [g]overnment's "position" includes both the underlying agency action that gave rise to the civil litigation and the arguments made during the litigation itself.'" *Cline*, 26 Vet.App. at 327 quoting *DGR Associates, Inc. v. United States*, 690 F.3d 1335, 1340 (Fed. Cir. 2012). Therefore, to prevail on "substantial justification" in this case, the government must demonstrate that the agency action leading to litigation as well as its litigation position in this Court, were "overall reasonable."

The *en banc* Court in *Butts* held that the Secretary's reliance on precedent (this Court's decision in *Johnson v. Shinseki*, 26 Vet.App. 237 (2013)) alone is not sufficient to establish substantial justification, particularly when that precedent supported an erroneous interpretation of statutes or regulations. *Butts v. McDonald*, 28 Vet.App. 74, 82 (2016). The Court stated that "whether the Government's position comported with then-existing precedent is 'an undeniably important factor,' but 'does not . . . resolve the substantial justification inquiry.'" *Id.* at 80 (quoting *Patrick v. Shinseki*, 668 F.3d 1325, 1332 (Fed. Cir. 2011)). To find otherwise "turns compliance . . . into a dispositive factor, contrary to the requirement that the substantial justification analysis be based on the totality of the circumstances." *Id.* at 83. The *Butts* Court determined that the Secretary's reliance on precedent alone is not a dispositive factor in the totality-of the-circumstances test. *Id.* at 82-83.

However, the circumstances of *Butts* differ from the case at bar. In that case, the Court held that Mr. Butts was a prevailing party, as the parties' Joint

Motion for Partial Remand "specifically states that remand is warranted because the Board decision '*does not comply* with the requirements of 38 C.F.R. § 3.321 (2014),'" thus "clearly conced[ing] error." *Butts*, 28 Vet.App. at 74. Where there was an expressly conceded administrative error in *Butts,* the Court here remanded the case because of a subsequent change in law. More significantly, this case is distinguishable from *Butts* where the Secretary did not prevail even though there was controlling precedent because the *en banc* Court found that VA's position "contradicted the plain language of the regulation." *Butts*, 28 Vet.App. at 83. Here, the Secretary's position was substantially justified because the constructive possession doctrine is not set forth in statute or regulation, so the Secretary did not contradict any statutory or regulatory language. In such a situation as here, where the government relies on a binding, precedential decision that is later overturned by a higher court, the government's position is usually substantially justified.

At the administrative level in the present case, the Secretary was substantially justified because the change in law occurred subsequent to the Board's decision. *See Wisner v. West*, 12 Vet.App. 330 (1999) (Secretary justified at administrative level where Board relied upon then current law); *see, e.g., White v. Nicholson*, 412 F.3d 1314 (Fed. Cir. 2005) (holding that the Veterans Court properly relied on "then-current law" in determining that the Secretary was substantially justified); *Coleman v. Nicholson*, 21 Vet.App. 386, 388-89 (2007) (Court's analysis of Secretary's actions must take into account degree to which the

Secretary relied on status of law prior to issuance of decision on appeal); *Clemmons v. West*, 12 Vet.App. 245 (1999) (finding the Board's position was substantially justified where the Board clearly relied upon then-current law); *Stillwell,* 6 Vet.App. at 303 (recognizing that, when analyzing substantial justification, "the evolution of VA benefits law since the creation of this Court [ ] has often resulted in new, different, or more stringent requirements for adjudication").

At the litigation level, "the matter was referred to a panel to address whether the 2014 Update was constructively before the Board such that it had an obligation to address the report as part of its *McLendon* analysis. *Euzebio v. Wilkie*, 31 Vet.App. at 399. The Court recited the development of the constructive possession doctrine and observed that it had over time "narrowed the reasonable expectation element of the constructive possession doctrine to include a relationship requirement." *Euzebio*, 31 Vet.App. at 400. The Court concluded that, "an appellant must show that there is a *direct relationship* between the document and his or her claim to demonstrate that the document was constructively before the Board, even if the document was generated for and received by VA under a statutory mandate." *Euzebio*, 31 Vet.App. at 401 (emphasis original), citing *Monzingo v. Shinseki*, 26 Vet.App. 97, 102 (2012) (per curiam). The Court affirmed the Board's decision and in its reply to the dissent, the Court noted that, "whether there may be policy reasons for considering NAS reports in *all* claims based on AO exposure, '[w]e are duty bound to follow the law . . . unless and until it is

changed.' *Euzebio*, 31 Vet.App. at 404, quoting *Ministerio Roca Solida v. United States*, 778 F.3d 1351, 1356 (Fed. Cir. 2015) (emphasis original).

The Federal Circuit changed the law by effectively overruling *Monzingo.* It vacated and remanded this Court's August 2019 decision, holding that the "direct relationship" was an erroneous legal standard, and that relevance and reasonableness were the correct standards. *Euzebio*, 989 F.3d at 1321. Thus, until the Federal Circuit issued its decision, this Court's case law held that the reasonable expectation element of the constructive possession doctrine included a direct relationship requirement. That analysis is now inapplicable, and the Federal Circuit has held that relevance and reasonableness are the determinative factors when determining whether a document was constructively before the Board. The Federal Circuit's holding is a departure from the state of the law that existed before the issuance of that court's opinion. The Federal Circuit's precedent in this case represents an "evolution of VA benefits law" that will result in a different and more stringent requirement for adjudication. *Stillwell*, 6 Vet.App. at 303. For that reason, though the Secretary's position was ultimately not correct, it was reasonable.

CONCLUSION

WHEREFORE, Appellee Denis McDonough, Secretary of Veterans Affairs, respectfully responds to Appellant's application for the award of attorney fees and other expenses, and advises the Court that it should deny the application because the Secretary's position was substantially justified**.**

Respectfully submitted,

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