IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

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

APPELLANT'S REPLY TO SECRETARY'S RESPONSE IN OPPOSITION TO APPELLANT'S APPLICATION FOR ATTORNEY FEES AND COSTS

On August 18, 2021, the Appellant, Robert M. Euzebio, filed a timely application under the Equal Access to Justice Act, 28 U.S.C. § 2412(d), for reasonable attorney fees. The Appellee, the Secretary of Veterans Affairs, contests the EAJA application on the grounds that (1) Mr. Euzebio is not a prevailing party and (2) the Secretary's position was substantially justified. Sec. Resp. at 5-14. The Secretary's arguments in opposition are factually and legally incorrect. Mr. Euzebio is a prevailing party because the Court remanded his case based expressly on administrative error. And the Secretary's position was not substantially justified at either the administrative or the litigation stage because it contravened the well-established relevance standard for constructive possession.

The Secretary does not contest, and therefore concedes, that Mr. Euzebio has satisfied all other elements of his EAJA claim, including the reasonableness of the amount sought. *See id.* at 3. The Court should grant Mr. Euzebio's EAJA application.

I. Mr. Euzebio is a prevailing party.

A person who has "receive[d] at least some relief on the merits" from his appeal of an agency decision is a prevailing party. *Buckhannon Bd. and Care Home, Inc. v. West Virginia Dept. of Health and Human Resources*, 532 U.S. 598, 603 (2001). Prevailing-party status is established through "a merits-stage remand predicated upon the Court's finding of error." *Vahey v. Nicholson*, 20 Vet.App. 208, 211 (2006). The appellant has the burden of demonstrating prevailing party status. *Butts v. McDonald*, 28 Vet.App. 74, 79 (2016) (en banc), *aff'd sub nom. Butts v. Wilkie*, 721 F. App'x 988 (Fed. Cir. 2018).

Mr. Euzebio is a prevailing party. This Court's May 2021 remand rests explicitly on administrative error. *Euzebio v. McDonough*, No. 17-2879, 2021 WL 2124303, at *3 (Vet. App. May 26, 2021); *cf.* Sec. Resp. at 7 (conceding that the Court's remand "implicates" administrative error). Summarizing Mr. Euzebio's argument, the Court stated, "Appellant alleges the Board erred in not considering [the 2014 *Veterans and Agent Orange* Update] because [it] was constructively before the Board." *Euzebio*, 2021 WL 2124303, at *3. It then stated, "We agree." *Id.* It remanded for the Board to consider whether the Update satisfied the test for entitlement to a VA medical examination. *Id.*

Because this Court already has found that an administrative error occurred, it should reject the Secretary's invitation to revisit that merits determination through EAJA litigation. *See* Sec. Resp. at 7 ("The Secretary respectfully argues that administrative error really is not at play here . . . ."). "[A]n EAJA decision-maker cannot relitigate the merits determination." *Blue v. Wilkie*, 30 Vet.App. 61, 68 (2018) (Allen, J.).

Regardless, the Secretary is wrong that a "change in law . . . occurred . . . subsequent to the Board's [July 2017] decision when the Federal Circuit vacated this Court's [August 2019] decision" and thus that no administrative error occurred. Sec. Resp. at 6. Instead, the Federal Circuit explained what the legal standard for constructive possession has been ever since this Court decided *Bell v. Derwinski*, 2 Vet.App. 611 (1992), twenty-five years before the Board's decision on Mr. Euzebio's claim. "The correct standard for constructive possession," the Federal Circuit held, is "articulated in *Bell*." *Euzebio v. McDonough*, 989 F.3d 1305, 1321 (Fed. Cir. 2021). Quoting *Bell*, the court stated that "evidence that is 'within the Secretary's control' and 'could reasonably be expected to be a part of the record "before the Secretary and the Board,'" is constructively part of the administrative record." *Id.* at 1319.

The Secretary's allegation in this EAJA litigation notwithstanding, he has repeatedly acknowledged that the "*Bell* rule," *id.* at 1318, is longstanding and well-established. In a 1995 precedential opinion of VA's General Counsel, which binds all

VA adjudicators, the Secretary stated that relevance is the governing legal standard for constructive possession: "The record in all AOJ decisions rendered on or after July 21, 1992, will . . . be deemed to include all pertinent VA medical evidence in existence on the date of the AOJ decisions, regardless of whether such evidence was actually in the record before the AOJ." *Subj: Clear and Unmistakable Error - Constructive Notice of VA Medical Records*, VA Aff. Op. Gen. Couns. Prec. 12-95, 1995 WL 17875505, at *3; *see* 38 U.S.C. § 7104(c). And in a recent pleading to this Court, he recognized that the Federal Circuit's decision in this case merely "clarifies" an existing judicial doctrine, which, he acknowledges, is "the *Bell* doctrine." *Aviles-Rivera v. McDonough*, Vet.App. No. 19-5969 (Sec. Resp. to Court Order filed June 7, 2021, at 9-10). As these issues from the Secretary show, the Federal Circuit's reaffirmance of the *Bell* relevance standard changed nothing. The Court should reject his contrary position in this litigation. *See* Sec. Resp. at 6.

It is the "*Bell* rule" that is "well-established," *Euzebio*, 989 F.3d at 1318, and not, as the Secretary claims, the "case law . . . that culminated in the direct relationship test described in *Monzingo v. Shinseki*, 26 Vet.App. 97, 102 (2012)," Sec. Resp. at 6. The Federal Circuit made clear that in *Monzingo*, this Court had strayed from the "well-established *Bell* rule," *Euzebio*, 989 F.3d at 1318. This Court's "narrow[ing]" of the constructive possession doctrine in *Monzingo* "was error" because it was "without basis in relevant statute or regulation." *Id.* at 1320. Indeed, the *Monzingo* Court's

"effort to formulate governing legal principles, untethered from statutory and regulatory standards, ha[d] led to absurd results." *Id.* at 1320. As this Court has since recognized in its May 2021 decision, the Federal Circuit's course correction was not a change in the law, *contra* Sec. Resp. at 6-7, but a restatement of what the correct standard always has been. *Euzebio*, 2021 WL 2124303, at *3.

Nor did the Federal Circuit in *Lang v. Wilkie*, 971 F.3d 1348 (Fed. Cir. 2020), "approv[e]" of the "direct relationship" standard as broadly as the Secretary suggests, Sec. Resp. at 6. The *Lang* court cited to *Monzingo* only for the decidedly narrower rule that "records generated by the VA as to one claimant are not normally constructively part of every claimant's record," 971 F.3d at 1353. That rule came from *Goodwin v. West*, 11 Vet.App. 494 (1998) (per curiam), and not *Monzingo*. *Lang*, 971 F.3d at 1353. And as the Federal Circuit stated in this case, the *Monzingo* Court had overread *Goodwin* to create the "direct relationship" test. *Euzebio*, 989 F.3d at 1430.

For these reasons, the Court should reject the Secretary's argument that there was no administrative error and hold that Mr. Euzebio is a prevailing party.

II. The Secretary has failed to prove that his position was substantially justified at either the administrative or the litigation stage.

The Secretary has the burden to show that his position was substantially justified at both the administrative and litigation stages to avoid payment of attorney fees and expenses. *See Bates v. Nicholson*, 20 Vet.App. 185, 190-91 (2006); *Locker v.*

Brown, 9 Vet.App. 535, 537 (1996). The term "substantially justified" means that the government's position was "justified in substance or in the main" and had a "reasonable basis both in law and fact." *Pierce v. Underwood*, 487 U.S. 552, 565 (1988) (citations and internal quotation marks omitted).

The Secretary's position at the administrative and litigation stages was not substantially justified under the totality of the circumstances. *See Stillwell v. Brown*, 6 Vet.App. 291, 302 (1994) (noting that the reasons given, consistency with judicial precedent and VA policy, the merits determination, and the agency's conduct and action or failure to act are among the factors for consideration).

Initially, the Secretary baselessly asserts that his position was substantially justified simply "because . . . [this] Court initially affirmed the Board's decision." Sec. Resp. at 8. "The position of the United States is not shown to have been substantially justified merely because the government prevailed before the tribunal below, for [i]f that were the rule, attorney's fees never could be awarded in favor of an appellant against the government." *Patrick v. Shinseki*, 668 F.3d 1325, 1333 (Fed. Cir. 2011) (internal quotation marks omitted). The Court should reject this assertion.

The essence of the Secretary's substantial justification argument is that the Board's decision and his litigating position were consistent with *Monzingo*'s "direct relationship" standard. Sec. Resp. at 12-14. But as he recognizes, compliance with then-existing precedent does not resolve the substantial justification inquiry. *Id.* at 11

(quoting *Butts*, 28 Vet.App. at 80 (quoting *Patrick*, 668 F.3d at 1332)). The Court should reject his attempt to "turn[] compliance with prior precedent into a dispositive factor, contrary to the requirement that the substantial justification analysis be based on the totality of the circumstances." *Butts*, 28 Vet.App. at 83. The Secretary's attempt to circumvent the totality of the circumstances test by distinguishing *Butts* on its facts also should fail. Sec Resp. at 12. Regardless of whether a "statute or regulation" (as in *Butts*) or "a binding, precedential decision" (as here) is the touchstone for the government's claim of compliance with existing law, Sec. Resp. at 12, the question is whether the government's position was reasonable under *all* the circumstances, *see Butts*, 28 Vet.App. at 80-81.

In any case, the Secretary mistakenly equates his adherence to the aberrant rule of *Monzingo* with "compliance with prior precedent," *id.* at 83. *See* Secretary's Br. at 12-14. "The correct standard for constructive possession" is "articulated in *Bell*," and not in *Monzingo*. *Euzebio*, 989 F.3d at 1321. *Monzingo* departed from the "well-established *Bell* rule," *id.* at 1318, and erroneously "narrowed" the constructive possession doctrine by overreading *Goodwin* and "formulat[ing] governing legal principles[] untethered from statutory and regulatory standards, [which] has led to absurd results," *Euzebio*, 989 F.3d at 1320. And even if the *Monzingo* direct relationship standard had not been "error," *id.*, "the fact that one other court

agreed or disagreed with the Government does not establish whether its position was substantially justified." *Pierce*, 487 U.S. at 569.

Because *Monzingo* was an aberration from longstanding precedent, the *Stillwell* factors of reasons given and consistency with judicial precedent and VA policy weigh against substantial justification even though the Secretary's position was consistent with that case. *See Cline v. Shinseki*, 26 Vet.App. 325, 327 (2013) (noting that these factors "have a high degree of overlap" when "the Secretary's reasoning is based on his adherence to prior precedent"), *abrogated on other grounds by Smith v. McDonough*, 995 F.3d 1338 (Fed. Cir. 2021)).

Monzingo's misguided detour from "the well-established *Bell* rule," *Euzebio*, 989 F.3d at 1318, distinguishes this case from those the Secretary cites to claim that following *Monzingo* substantially justified his position. *See* Sec. Resp. at 12-13. Rather, the reasoning of *Patrick* should apply. There, the Federal Circuit rejected the Secretary's contention that his position was substantially justified because he relied on precedent supporting his prior interpretation of 38 U.S.C. § 1111. *Patrick*, 668 F.3d at 1332. The court reasoned that the Secretary's prior interpretation was wholly unsupported by either the plain language of the statute or its legislative history. *Id.* at 1333. Likewise, here, the Secretary's reliance on *Monzingo*'s direct relationship standard is no recourse because *Monzingo* was wholly at odds with the well-established relevance standard of *Bell*. *Cf. Role Models Am., Inc. v. Brownlee*, 353 F.3d 962, 967 (D.C.

Cir. 2004) ("[T]he regulations were so clear and the Secretary's failure to comply with them so obvious that his actions could not 'appear correct to a reasonable person.'")

The other *Stillwell* factors likewise weigh against finding substantial justification. The Federal Circuit's reasoning on the merits of Mr. Euzebio's appeal shows that the Secretary's position lacked a reasonable basis in the law. *See Stillwell*, 6 Vet.App. at 302. Although "[t]he inquiry into the reasonableness of the Government's position . . . may not be collapsed into [the] antecedent evaluation of the merits," "a court's merits reasoning may be quite relevant to the resolution of the substantial justification question." *Cline*, 26 Vet.App. at 327. For example, if a court finds at the merits stage that the agency's position was unsupported by substantial evidence, then its position lacked a reasonable factual basis and is not substantially justified. *Id.* The Federal Circuit's finding at the merits stage similarly shows that the Secretary's position here lacked a reasonable legal basis. *See Pierce*, 487 U.S. at 565. *Monzingo*'s "direct relationship" standard was "without basis in relevant statute or regulation," and *Monzingo*'s "effort to formulate governing legal principles, untethered from statutory and regulatory standards, has led to absurd results." *Euzebio*, 989 F.3d at 1320. This shows that the Federal Circuit vacated this Court's affirmance of the Board's decision based on *Monzingo* because it lacked a reasonable legal basis. *Id.*; *see Euzebio v. Wilkie*, 31 Vet.App. 394, 404 & n.7 (2019) ("[W]e find no meaningful distinction between the congressionally mandated NAS report considered in *Monzingo* and the NAS report at

issue here."). The merits decision therefore weighs against a finding of substantial justification. *See Marcus v. Shalala*, 17 F.3d 1033, 1038 (7th Cir. 1994) (explaining that a merits panel's remarks that the government's position was "unconvincing" and "make[s] little sense," or its indication that it "did not even consider the issue to be a close one," weigh against finding substantial justification).

The Secretary's action and inaction at both the administrative and litigation stages also weigh against a finding of substantial justification. *Cline*, 26 Vet.App. at 328; *Stillwell*, 6 Vet.App. at 302. "[I]t is clear that the Board knew of the existence of the 2014 Update and that it was relevant to [Mr. Euzebio's] claim for service connection for a thyroid condition due to Agent Orange exposure." *Euzebio*, 2021 WL 2124303, at *3; *see also Euzebio*, 989 F.3d at 1320. And yet "the Board failed to consider the 2014 Update in its assessment." *Euzebio*, 2021 WL 2124303, at *3. The Board's failure to consider a relevant document it was aware of was unreasonable. At the litigation stage, the Secretary's conduct likewise was unreasonable, given his reliance on a rule "untethered from statutory and regulatory standards" and that had "led to absurd results." *Euzebio*, 989 F.3d at 1320. And although he tried to argue before the Federal Circuit "that 'direct relationship' and 'relevance' are more or less the same standard," the court called that argument "facially incorrect." *Id.* at 1324. The agency's conduct at both stages of the proceedings therefore should weigh against finding substantial justification.

Finally, the Court should reject the Secretary's claim that one of the "special circumstances" recognized in *Stillwell* weighs in favor of finding substantial justification, 6 Vet.App. at 303. Sec. Resp. at 14. Contrary to his contention, the Federal Circuit's decision does not "represent[] an 'evolution of VA benefits law' that will result in a different and more stringent requirement for adjudication." *Id.* (quoting *Stillwell*, 6 Vet.App. at 303). There could hardly be a more inaccurate description of the reaffirmance of the "well-established" standard for constructive possession that predated the Board's decision by twenty-five years. *Euzebio*, 989 F.3d at 1318. The Court should hold that the Secretary's position was not substantially justified.

CONCLUSION

The Court should hold that Mr. Euzebio is a prevailing party because he obtained a remand based on the Board's application of an erroneous legal standard for constructive possession. The Court should also hold that the Secretary's position was not substantially justified under the totality of the circumstances. Finally, no special circumstances exist that would make an award unjust. *See* 28 U.S.C. § 2412(d)(1)(A).

The Court should therefore grant the EAJA application and order that Mr. Euzebio is entitled to an award in the amount of $78,333.00.[1]

Respectfully submitted,

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[1] Mr. Euzebio reserves his right to file a supplemental EAJA application pursuant to U.S. Vet. App. R. 39(b) if the Court determines that he is entitled to EAJA fees. *See Wagner v. Shinseki*, 733 F.3d 1343, 1350 (Fed. Cir. 2013).