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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 17-2879(E)

ROBERT M. EUZEBIO, APPELLANT,

V.

DENIS MCDONOUGH,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before ALLEN, *Judge*.

MEMORANDUM DECISION

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

ALLEN, *Judge*: Before the Court is appellant Robert M. Euzebio's June 22, 2021, application pursuant to the Equal Access to Justice Act (EAJA),[1] for an award of attorney fees and expenses in the amount of $78,333. The Secretary filed a response in opposition to that application, and appellant filed a reply. The Secretary argues that appellant is not a prevailing party and that the Secretary's position was substantially justified. The Court has jurisdiction to award reasonable fees and expenses.[2] Because appellant is a prevailing party and the Secretary has not met his burden of showing his position was substantially justified, we will grant the EAJA application in full.

I. BACKGROUND

On August 30, 2017, appellant filed an appeal from a July 20, 2017, Board of Veterans' Appeals decision that denied entitlement to service connection for benign thyroid nodules, including as due to Agent Orange exposure. The matter was referred to a panel of the Court principally to determine whether the National Academies of Sciences, Engineering & Medicine's

[1] 28 U.S.C. § 2412(d).

[2] 28 U.S.C. § 2412(d)(2)(F).

(NAS's) report, *Veterans and Agent Orange: Update 2014* (2014 Update), was constructively before the Board. In an August 22, 2019, precedential decision, the Court held the 2014 Update was not before the Board because it did not have a direct relationship to appellant's case and did not need to be considered in determining whether an examination was warranted.[3] Thus, the Court affirmed the Board's decision.

On March 3, 2021, the United States Court of Appeals for the Federal Circuit vacated the August 2019 decision and remanded the matter, holding that the Court had applied an erroneous legal standard when we required a direct relationship between the NAS report and appellant's claim. [4] The Federal Circuit held that the correct standard instead was relevance and reasonableness, as articulated in *Bell v. Derwinski*, 2 Vet.App. 611 (1992).[5]

On May 26, 2021, this Court, in applying the relevance and reasonableness standard from *Euzebio II*, concluded that the 2014 Update was constructively before the Board at the time of the July 2017 decision and that the Board erred in not considering it when determining whether a VA examination was warranted for appellant's thyroid nodules.[6]

Appellant filed his EAJA application in August 2021, seeking attorney fees in the amount of $76,667.48 and expenses totaling $1665.52.[7] Several months later, the Secretary responded, arguing that appellant is not a prevailing party because the Court's remand was based on a change in the law that occurred after the Board issued its decision. He also contends that his position is substantially justified because at both the Agency and appellate level it was consistent with then-current caselaw. The Secretary does not dispute any other aspect of appellant's EAJA application, including the reasonableness of the fees and expenses appellant seeks. In reply, appellant argues that he is a prevailing party because the Court's remand was based on administrative error and the Secretary was not substantially justified because he did not comply with the well-established *Bell* rule for constructive possession.

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[3] *Euzebio v. Wilkie* (*Euzebio I*), 31 Vet.App. 394 (2019).

[4] *Euzebio v. Wilkie* (*Euzebio II*), 989 F.3d 1305, 1319 (Fed. Cir. 2021).

[5] *Id.* at 1321.

[6] *Euzebio v. McDonough*, No. 17-2879, 2021 WL 2124303 (Vet.App. May 26, 2021).

[7] EAJA Application at 9-10.

II. ANALYSIS

To establish eligibility for an EAJA award, an application must be filed within 30 days after final judgment and contain (1) a showing that appellant is a prevailing party, (2) an assertion that 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.[8] As noted above, the Secretary challenges only whether appellant is a prevailing party and whether the Secretary's position was substantially justified. We discuss each in turn below.

A. Prevailing Party

To achieve prevailing-party status, a claimant must receive "some relief on the merits" that materially alters the parties' legal relationship.[9] A remand to the administrative agency for additional proceedings may confer prevailing-party status, but only if the remand is predicated – explicitly or implicitly – on administrative error.[10]

When analyzing whether an appellant has been granted "some relief on the merits" in the context of a remand, this Court has employed the test the Federal Circuit articulated in *Dover v. McDonald*:

> An appellant who secures a remand to an administrative agency is a prevailing party under the EAJA if (1) the remand was necessitated by or predicated upon administrative error, (2) the remanding court did not retain jurisdiction, and (3) the language in the remand order clearly called for further agency proceedings, which leaves the possibility of attaining a favorable merits determination.[11]

Additionally, this Court has held that the "touchstone of prevailing-party status is whether remand to an agency is predicated on a finding or concession of administrative error – not the basis on which such error is established"[12] In *Conley*, the Court held that appellant was a prevailing party where a Court remand actually applied an intervening change in law in the first instance

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[8] *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).

[9] *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't Health & Human Res.*, 532 U.S. 598, 603-04 (2001); *Conley v. Wilkie*, 30 Vet.App. 224, 226 (2018).

[10] *Robinson v. O'Rourke*, 891 F.3d 976, 980-81 (Fed. Cir. 2018); *see Conley*, 30 Vet.App. at 226.

[11] *Blue v. Wilkie*, 30 Vet.App. 61, 67 (2018) (citing *Dover v. McDonald*, 818 F.3d 1316, 1319 (Fed. Cir. 2016)).

[12] *Conley*, 30 Vet.App. at 230.

rather than remanding simply for the Board to consider the intervening law.[13] The EAJA claimant bears the burden of proving prevailing-party status.[14]

Here, there is no question that, following the remand in appellant's underlying appeal, the Court did not retain jurisdiction and that the remand called for additional Agency proceedings. The single-judge remand transferred jurisdiction over the appeal back to the Board for the Board to determine whether the 2014 Update was sufficient evidence to warrant a VA examination. The only remaining question is whether the remand was predicated on Agency error.

In the single-judge remand, the Court found that the 2014 Update was before the Board and that the Board was required to consider that evidence in determining whether a VA examination was warranted. In doing so, the Court specifically applied the Federal Circuit's decision in *Euzebio II* to the merits of appellant's case, finding that the Board erred in failing to consider the 2014 Update. Thus, as in *Conley*, the Court's remand was based on an application of the intervening law to the merits of the case and not on the Board's need to apply the intervening law. Thus, the Court's remand was based on administrative error.

To the extent the Secretary challenges appellant's prevailing-party status, he premises his argument on what he sees as a change in the law with the Federal Circuit's decision in *Euzebio II*. However, as explained above, this Court's application of *Euzebio II* rather than returning the case for the Board to apply *Euzebio II* and the Court's finding of error in the Board's decision means his argument must fail, even assuming that the Federal Circuit changed the legal landscape in its decision in *Euzebio II*. Appellant has met the factors to be considered a prevailing party.

B. Substantial Justification

Where a party alleges that the Secretary's position was not substantially justified, the burden shifts to the Secretary to prove substantial justification.[15] "The Secretary's position is 'substantially justified' when it is founded upon a 'reasonable basis in both law and fact.'"[16] "In order to prevail, the Secretary must show substantial justification for both his administrative and

[13] *Id.* at 228.

[14] *Davis v. Nicholson*, 475 F.3d 1360, 1366 (Fed. Cir. 2007).

[15] *Stillwell v. Brown*, 6 Vet.App. 291, 301 (1994).

[16] *Dixon v. O'Rourke*, 30 Vet.App. 113, 118 (2018) (per curiam order) (quoting *Pierce v. Underwood*, 487 U.S. 552, 564 (1988)).

litigation positions."[17] 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."[18] 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."[19]

"[T]he substantial justification inquiry requires an analysis of the 'totality of the circumstances' surrounding the government's adoption of a particular position."[20] 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."[21] However, no one factor is dispositive.[22] In fact, this Court held in *Butts v. McDonald* that reliance on precedent alone is not a dispositive factor in considering the totality of the circumstances.[23]

Here, the Secretary contends that his position was substantially justified because the Board relied on then-current caselaw in its decision, specifically *Monzingo*, and that this Court initially affirmed the Board's decision. While the Secretary acknowledged the "totality of the circumstances" test, his response focused on the fact that both the Board in its July 2017 decision and the Secretary during litigation relied on binding precedent. Although he acknowledged that reliance on precedent alone is not dispositive, he distinguished *Butts* because in that case the Court found that VA's position contradicted the plain language of the regulation. Here, the Secretary argues, the constructive possession doctrine is not set forth in a statute or regulation.

The Secretary does not meet his burden of showing his position was substantially justified. He provides no analysis of a totality of the circumstances, instead focusing on his reliance on precedent and distinguishing this case from *Butts*. The Secretary may be correct that the factual

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[17] *Locher v. Brown*, 9 Vet.App. 535, 537 (1996).

[18] *Felton v. Brown*, 7 Vet.App. 276, 281 (1994).

[19] *Id.* (quoting *Underwood*, 487 U.S. at 565).

[20] *Patrick v. Shinseki*, 668 F.3d 1325, 1332 (Fed. Cir. 2011).

[21] *Stillwell*, 6 Vet.App. at 302; *see also Lacey v. Wilkie*, 32 Vet.App. 387, 390 (2020).

[22] *Patrick*, 668 F.3d at 1332.

[23] 28 Vet.App. 74, 82-83 (2016) (en banc).

bases of this case are distinct from those in *Butts*, but he does not explain how that is the case in arguing his position was substantially justified. Thus, we need not reach that issue today.

This Court has held that reliance on precedent is not a dispositive factor since the *Butts* decision.[24] Instead, the Court conducts a more thorough analysis of the totality of the circumstances.[25] Because the Secretary has only provided his reliance on precedent as the reason his position is substantially justified, he fails to meet his burden of establishing substantial justification under the totality of the circumstances test. He has therefore not met his burden, and that is as far as we need to go in addressing appellant's application.

In sum, because the Secretary bears the burden of showing his position was substantially justified and because he solely relies on his adherence to precedent at the Agency level and during litigation, we conclude he has not met his burden of showing substantial justification. The Secretary does not provide an analysis of any other factor related to the totality of the circumstances to show his position was substantially justified. Thus, we will grant appellant's petition.

III. CONCLUSION

Upon consideration of the foregoing, appellant's EAJA application is GRANTED in full, in the amount of $78,333.

DATED: January 4, 2022

Copies to:

Zachary M. Stolz, Esq.

VA General Counsel (027)

[24] *See, e.g.*, *Saunders v. Wilkie*, No. 15-0975(E), 2019 WL 5848115, at *2 (Vet. App. Nov. 8, 2019) (finding the Secretary's position was not substantially justified even where the Secretary relied on longstanding precedent that pain was not a disability).

[25] *See Lacey*, 32 Vet.App. at 390-91.