UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

FLORENCE PETITE, **Appellant,** **v.** **DENIS MCDONOUGH,** **Secretary of Veterans Affairs,** **Appellee.**	Vet. App. No. 19-5815-EAJA

Appellant's Reply to Secretary's Response to Appellant's EAJA Application

Florence Petite submits the following reply to VA's opposition to her application for an award of attorney fees and expenses under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412.

Appellant is a "prevailing party" and the reasonableness of her application is uncontested.

The VA concedes that Ms. Petite was a prevailing party for purposes of receiving an award of attorney fees and expenses under the EAJA and that there are no special circumstances that would make an award of fees unjust. VA's Response p. 1. Further, the VA has not contested the reasonableness of her application. *Id.*

The VA's position at the administrative level was not substantially justified.

The Secretary asserts that his position was substantially justified in this case at both the administrative and litigation stages. Sec.Resp., p. 4. In support, the Secretary submits:

> This Court has determined that the Government's position can be substantially justified where, as here, that position was invalidated in a case of first impression. *See Felton v. Brown*, 7 Vet.App. 276 (1994). In *Felton*, the Court emphasized that it was not adopting a "*per se* rule that a case of first impression will always render the Government's position substantially justified," *id.* at 281, but it found that the Secretary's position was substantially justified "[g]iven the statutory silence on the particular matter and the lack of a conflict with adverse precedent," *id.* at 283.

Sec.Resp., p. 5. The Secretary's reliance on *Felton* is misplaced since he did not assert that this was a case of first impression nor did this Court's decision deal with this issue of statutory interpretation as a matter of first impression.

To the contrary, this Court's decision relied upon the following:

> Given section 101(4)(A)(iii)'s conspicuous silence on the matter, we will abide by the plain language of the statute and not read into it a limitation that is not present in its text. *See Alabama v. North Carolina*, 560 U.S. 330, 352 (2010) (declaring that courts "cannot[] add provisions to a federal statute"; *Bates v. United States*, 522 U.S. 23, 29 (1997) (advising courts to "ordinarily resist reading words or elements into a statute that do not appear on its fac'"); *Keene Corp.*, 508 U.S. at 208 (underscoring a court's"' "duty to refrain from reading a

> phrase into [a] statute when Congress has left it out"). We therefore hold that, unless a particular statute indicates otherwise, whether an individual's course of instruction is full-time or part-time is not a relevant consideration under section 101(4)(A)(iii) when determining whether an individual is a "child" for CHAMPVA purposes.

Court's December 16, 2021 decision, p. 7. In light of this holding, this portion of this Court decision was not premised on a case of first impression but was in fact based on settled law that reviewing courts have a duty to refrain from reading a phrase into a statute when Congress has left it out. Furthermore, the Secretary in his response did not assert that his position at both the administrative or litigation stage was justified by having read into § 101(4)(A)(iii) a meaning Congress left out.

The Secretary argues:

> Although 38 U.S.C. § 1781 and 38 U.S.C. § 101(4)(A) were silent on the pertinent issue, the Secretary argued that the broader statutory scheme supported his position, relying on 38 U.S.C. § 1781(b), the CHAMPVA statute, which requires that "the Secretary shall provide for medical care in the same or similar manner and subject to the same or similar limitations as medical care is furnished to certain dependents and survivors of active duty and retired members of the Armed Forces under chapter 55 of title 10 [10 U.S.C. §§ 1071 et seq.] (CHAMPUS)." Appellee's Brief at 16, *Petite*, Vet.App. No. 19-5815 (May 6, 2021). As the Secretary argued, under 10 U.S.C. § 1072, an eligible child who has attained 18 years of age must be "enrolled in a full-time course of study at an institution of higher learning approved by the administering Secretary." *Id.* at 16-17. The Secretary's position in this case was substantially justified because it was premised on the plain language of the applicable statutes and was thought to be consistent with the broader statutory scheme. The Court

> was required to decide how the competing statutory instructions were to be read together and how they applied in this case of first impression. The Secretary's position, although incorrect, was premised on the plain language of the CHAMPVA statute, 38 U.S.C. § 1781(b), and thus was substantially justified.

Sec.Resp., pp. 6-7. This argument does not show that the Secretary's position at the litigation stage was justified because, as this Court noted in its decision, the Secretary argued that section 1781 contains a program-specific definition of "child" that trumped section 101(4)(A)(iii)'s general definition of the term. Court's December 16, 2021 decision, p. 7. An argument rejected by this Court since neither subsection supported his argument. Court's December 16, 2021 decision, p. 8. This was not a rejection based on a case of first impression, it was rejection based on this Court's reading of the plain text of the statute.

This Court explained:

> Moreover, there is only one way to read subsection (c) to give meaning to all its terms, and that reading is incompatible with the Secretary's proposed interpretation. Subsection (c) contains four requirements for retention. The first is the general, unnumbered requirement that an individual must be "a child between the ages of eighteen and twenty-three." 38 U.S.C. § 1781(c). The other requirements, which are numbered, specify that, to be entitled to retention of CHAMPVA benefits for a set period, such child must (1) be "eligible for benefits under subsection (a) of [section 1781]"; (2) be "pursuing a full-time course of instruction at an educational institution approved under chapter 36 of [title 38]"; and (3) 'while pursuing such course of instruction, incur[] a disabling illness or injury . . . which is not the result

of such child's own willful misconduct and which results in such child's inability to continue or resume such child's chosen program of education at an approved educational institution" *Id.* The Secretary's interpretation creates an unnecessary redundancy among those requirements.

Specifically, if the Secretary were correct that to be eligible to receive CHAMPVA benefits between ages 18 and 23 an individual must be pursuing a full-time course of instruction at a VA approved educational institution, then there would be no need for subsection 1781(c) to repeat that requirement when specifying who is eligible to retain those benefits. Simply stating, as subsection (c) does now, that "a child between the ages of eighteen and twenty-three" may retain those benefits would be enough because the definition of "child" for that age range would already include a fulltime course of instruction requirement. In other words, the only way to harmonize subsection (c)'s general "child between the ages of eighteen and twenty-three" requirement with its specific 'fulltime course of instruction" requirement is to read the former as not requiring pursuit of a full-time course of instruction for CHAMPVA eligibility generally and the latter as imposing such an additional and separate requirement for retention purposes only. Given that courts should endeavor to "fit, if possible, all parts [of a statute] into a harmonious whole," *Nielson v. Shinseki*, 607 F.3d 802, 807 (Fed. Cir. 2010), and avoid statutory interpretations that result in redundancies between operative terms, *see Commodity Futures Trading Comm'n v. Worth Bullion Grp., Inc.*, 717 F.3d 545, 550 (7th Cir. 2013), we reject the Secretary's argument that section 1781(c)'s fulltime course of instruction requirement applies to situations other than the retention of CHAMPVA benefits for beneficiaries with disabilities.

In sum, consistent with the plain language of section 1781, which does not contain a specific definition of "child" for CHAMPVA purposes, and section 101(4), which does contain a general definition of the term for all title 38 programs, we hold that an individual who is between ages 18

> and 23 and who otherwise meets the requirements of sections 101(4)(A)(iii) and 1781(a) qualifies as a "child" for CHAMPVA purposes if he or she is "pursuing a course of instruction at an approved educational institution," regardless of whether that course of instruction is part-time or full-time. 38 U.S.C. § 101(4)(A)(iii); see 38 U.S.C. § 1781(a). Because the plain language of these statutes compels this interpretation, our inquiry is at an end and there is no need to look to legislative history or other authorities to discern their meaning. *See Good Samaritan Hosp.*, 508 U.S. at 409; *Est. of Cowart*, 505 U.S. at 475.

Court's December 16, 2021 decision, pp. 9-10. When as here, the decision of the reviewing court is based upon the plain language of the statutes involved, it is not an issue of first impression it is merely an question of the plain meaning which was not changed by the decision of the reviewing Court.

In order to defeat this application, the Secretary must show that the Government's position was "substantially justified." *Brewer v. American Battle Monument Commission*, 814 F.2d 1564, 1566 (Fed. Cir. 1987); *Stillwell v. Brown*, 6 Vet. App. 291, 301 (1994), *appeal dismissed*, 46 F.3d 1111 (Fed. Cir. 1995). *See* 28 U.S.C. § 2412(d)(1)(B). The Government must show its position to have had a "reasonable basis both in law and fact." *Pierce v. Underwood*, 487 U.S. 552, 563-68, 108B S. Ct. 2541, 2549-51, 101 L. Ed.2d. 503-506 (1988); *Beta Systems v. United States*, 866 F.2d 1404, 1406 (Fed. Cir. 1989). "Substantial justification" is in the nature of an affirmative defense: If the Secretary wishes to have its benefit, he must carry the burden of proof on the issue. *Clemmons v. West*, 12 Vet. App. 245, 246 (1999), *appeal dismissed*, 206 F.3d 1401 (Fed. Cir. 2000). Because this Court

resolved this appeal based on the plain meaning of the text of the statutes at issue, this was not a case of first impression such that the Secretary can show that his administrative and litigation positions were substantially justified because the were not. The Secretary's positions were based on a misreading of the plain language used by Congress which was a misinterpretation of the plain meaning.

The "EAJA authorizes the payment of fees to a prevailing party in an action against the United States; [but] the Government may defeat this entitlement by showing that its position in the underlying litigation 'was substantially justified.'" *Scarborough v. Principi,* 541 U.S. 401, 405 (2004). A reviewing court must make that determination upon consideration of:

> Whether or not the position of the United States was substantially justified shall be determined on the basis of the record (including the record with respect to the action or failure to act by the agency upon which the civil action is based) which is made in the civil action for which fees and other expenses are sought.

28 U.S.C. § 2412(d)(1)(B). In administrative agency cases like Ms. Petite's, the government must justify *both* its position in the *litigation* for which the award is sought and *also* its position in the *administrative* decision which made that litigation necessary. *Jean,* 496 U.S. at 159; *Morgan v. Perry*, 142 F.3d 670 (3rd Cir. 1998).

The government bears a heavy burden to prove that its administrative position was substantially justified. "Substantially justified" means "justified to a degree that

could satisfy a reasonable person." *Pierce,* 487 U.S. at 565. Finally, the scope of review when assessing justification is the "totality of the circumstances." *E.g.*, *White v. Nicholson*, 412 F.3d 1314 (Fed. Cir. 2005).

Conclusion

As the VA has conceded Ms. Petite prevailed in her appeal. She prevailed because this Court found that the Board misinterpreted the plain meaning of the applicable statutory provisions. The Secretary has not met its burden of proving that its administrative position as well as his litigation positions were substantially justified. The Secretary has not made the requisite showing and therefore this Court should grant Ms. Petite's application in the amount of $ 15,773.00.

Respectfully submitted,

/s/Kenneth M. Carpenter
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Electronically filed on July 22, 2022.