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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 19-5815(E)

FLORENCE PETITE, APPELLANT,

V.

DENIS MCDONOUGH,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before BARTLEY, *Chief Judge*.

MEMORANDUM DECISION

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

BARTLEY, *Chief Judge*: Florence Petite seeks attorney fees and expenses under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d), in the amount of $15,773.00. For the reasons that follow, the Court will deny Ms. Petite's EAJA application.

I. BACKGROUND

In August 2019, the Board of Veterans' Appeals (Board) denied Ms. Petite entitlement to continued benefits under the Civilian Health and Medical Program of the Department of Veterans Affairs (CHAMPVA) because she was over age 18 and had not demonstrated that she was permanently incapable of self-support or was pursuing a full-time course of instruction at a VA-approved educational institution. *See Petite v. McDonough*, 35 Vet.App. 64, 67 (2021). Ms. Petite appealed that decision and initially proceeded pro se. However, when the appeal was submitted for panel consideration, Ms. Petite's current counsel entered an appearance on her behalf and filed substitute briefing.

In December 2021, a panel of the Court issued a precedential decision reversing the Board's finding that Ms. Petite was categorically ineligible to continue receiving CHAMPVA benefits based on her enrollment in a part-time, rather than full-time, course of instruction. *Id*. at 73-74.

The Court explained that the Board's finding in that regard was "based on a misinterpretation of the controlling law, as neither [38 U.S.C. §] 101(4)(A)(iii)"—the general definition of "child" for title 38 programs—"nor [38 U.S.C. §] 1781"—the CHAMPVA statute—"requires a full-time course of instruction for an individual between ages 18 and 23 to qualify as a child for CHAMPVA purposes." *Id*. at 73. Accordingly, the Court remanded for the Board to readjudicate Ms. Petite's entitlement to CHAMPVA benefits using the generally applicable definition of "child" found in section 101(4)(A)(iii). *Id*. at 73-74.

In April 2022, Ms. Petite filed her EAJA application. The Secretary responded in June 2022, conceding that Ms. Petite is a prevailing party, that no special circumstances exist that would make an EAJA award unjust, and that the amount of fees and expenses sought is reasonable. Secretary's Response to EAJA Application (Resp.) at 1. However, he opposed the application on the ground that his position at both the administrative and litigation stages—namely, that Ms. Petite's enrollment in a part-time course of instruction did not qualify her as a "child" for CHAMPVA purposes after she turned 18—was substantially justified. *Id*. at 4-10. As support, he noted that there was no precedent on this specific question prior to the Court's decision in this case, that the relevant statutes were silent on the matter, and that his position was consistent with the legislative history of the CHAMPVA statute and long-standing VA policy. *Id*.

Ms. Petite filed her reply in July 2022, arguing that the Secretary's position was not substantially justified because it was contrary to the plain language of sections 101(4)(A)(iii) and 1781. Appellant's Reply at 2-8. Specifically, she asserted that the Court's decision did not involve an issue of first impression, but rather was "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." *Id*. at 3.

II. ANALYSIS

The Court has jurisdiction to award reasonable attorney fees and expenses pursuant to 28 U.S.C. § 2412(d)(2)(F). The Court may grant such an award when (1) the applicant is a prevailing party, (2) the Government's position was not substantially justified, (3) no special circumstances exist that make an award unjust, and (4) the applicant submits a timely application itemizing the fees and expenses sought. *Comm'r, I.N.S. v. Jean*, 496 U.S. 154, 158 (1990). The only requirement at issue here is whether the Secretary's position was substantially justified.

The Secretary bears the burden of demonstrating that his position was substantially justified at both the administrative and litigation stages. *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); *see Stillwell v. Brown*, 6 Vet.App. 291, 302 (1994) ("[T]he entirety of the conduct of the government is to be analyzed, both the government's litigation position and the action or inaction by the agency prior to the litigation."). "Substantially justified" means "justified to a degree that could satisfy a reasonable person." *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). Thus, a position "'can be justified even though it is not correct'" and "'can be substantially (i.e., for the most part) justified if a reasonable person could think it correct, that is, if it has a reasonable basis in law and fact.'" *Stillwell*, 6 Vet.App. at 302 (quoting *Underwood*, 487 U.S. at 566 n.2); *see Patrick v. Shinseki*, 668 F.3d 1325, 1330 (Fed. Cir. 2011) ("The government can establish that its position was substantially justified if it demonstrates that it adopted a reasonable, albeit incorrect, interpretation of a particular statute or regulation."). Whether the Secretary's position was reasonable is based on the totality of the circumstances; factors for consideration include "'merits, conduct, reasons given, and consistency with judicial precedent and VA policy with respect to such position, and action or failure to act,' along with any other applicable circumstances." *Butts*, 28 Vet.App. at 79 (quoting *Stillwell*, 6 Vet.App. at 302). No one factor is dispositive. *Id*. at 80.

As relevant here, "whether a case is one of first impression is only one factor for the Court to consider" in the substantial justification inquiry; there is no "per se rule that a case of first impression will always render the Government's position substantially justified." *Felton v. Brown*, 7 Vet.App. 276, 281 (1994). Although substantial justification is measured "against the law that was prevailing at the time the government adopted its position," *Bowey v. West*, 218 F.3d 1373, 1377 (Fed. Cir. 2000), where the Secretary "interprets a statute in a manner that is contrary to its plain language and unsupported by its legislative history, it will prove difficult to establish substantial justification," *Patrick*, 668 F.3d at 1330-31.

Turning to the circumstances of this case, the Court concludes that the Secretary's position had a reasonable basis in law and fact and, thus, was substantially justified. As outlined in detail in the Court's panel decision on the merits of Ms. Petite's appeal, the Secretary's position, both at the administrative and litigation phases, was that Ms. Petite was not eligible to continue receiving CHAMPVA benefits because she was between the ages of 18 and 23 and was not pursuing a full-time course of instruction at a VA-approved education institution. *Petite*, 35 Vet.App. at 67-69.

That position was based on the Secretary's belief that section 1781 contained a program-specific definition of "child" for CHAMPVA purposes that was either (1) incorporated by reference from 10 U.S.C. § 1072(2)(D)(ii) via section 1781(b)'s instruction that VA "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 [TRICARE]," or (2) made applicable to the entire CHAMPVA program via section 1781(c), a CHAMPVA retention provision that expressly mentions individuals pursuing a full-time course of instruction. *Id*. at 70-71. Although the Court ultimately rejected both of those readings of the CHAMPVA statute and instead relied on the plain language of the generally applicable definition of "child" found in section 101(4)(A)(iii), it was not unreasonable to interpret the limitations in section 1781(b) and (c) in the manner urged by the Secretary, particularly given the lack of controlling precedent on that particular issue at the time of the Board decision and during litigation at this Court. *See Felton*, 7 Vet.App. at 285 (concluding that the Secretary's position was substantially justified where he made "a good faith effort to interpret an evolving area of the law, and he did not take a position which was unreasonable or in direct conflict with established precedent" (internal quotation omitted)); *Stillwell*, 6 Vet.App. at 303 (in denying an application for EAJA, noting that "some cases before this Court are ones of first impression involving good faith arguments of the government that are eventually rejected by the Court").

Ms. Petite attempts to downplay the lack of precedent and argues instead that the fact that the Court ultimately decided the appeal based on the plain language of sections 101(4)(A)(iii) and 1781 counsels against a finding that the Secretary's position was substantially justified. Appellant's Reply at 2-8. Contrary to her contention, the appeal involved an issue of first impression because, prior to the panel's decision in this case, no court had addressed whether an individual between the ages of 18 and 23 qualified as a "child" for CHAMPVA purposes when pursuing a part-time, rather than full-time, course of instruction. That fact—while not dispositive, *see Butts*, 28 Vet.App. at 80; *Felton*, 7 Vet.App. at 281—weighs in favor of a finding of substantial justification here, as the Court had to untangle a complex web of interrelated statutes spanning different titles of the U.S. Code to answer that interpretative question, even if it ultimately resorted to the traditional tools of statutory interpretation to do so. *See Petite*, 35 Vet.App. at 69-73. Given that complexity, the Court concludes that the Secretary's good faith interpretation of the relevant statutes was a reasonable, albeit incorrect, position. *See Bates v. Nicholson*, 20 Vet.App. 185, 192 (2006)

(concluding that, although the U.S. Court of Appeals for the Federal Circuit held that the Secretary's interpretation of 38 U.S.C. § 511(a) was contrary to the statute's "plain language" and had "no basis in the statutory language, legislative history, or case authority," the Secretary's position was substantially justified because the issue was "a matter of first impression" and the outcome "could not have been easily divined from existing caselaw"); *Ozer v. Principi*, 16 Vet.App. 475, 478 (2002) (applying *Felton* and concluding that the Secretary's enactment of a regulation that "contravened the plain language of the statute" was substantially justified where, inter alia, the Secretary's conduct represented "a good faith effort to interpret an evolving area of the law" and did not conflict with then-existing precedent); *see also Pottgieser v. Kizer*, 906 F.2d 1319, 1324 (9th Cir.1990) (finding that the government's reading of a Social Security statute, although contrary to its plain language, was substantially justified because "the Secretary's litigation position had a reasonable basis and the Social Security statutes [are] complex").

In addition, in his briefing in the underlying appeal, the Secretary identified legislative history that he believed was consistent with his position, including a 1979 Senate report regarding the addition of section 1781(c), *see* Secretary's May 6, 2021, Substitute Brief (Br.) at 17-18 (citing S. REP. NO. 96-177 (1979)); and various bills that had been introduced over the years (but not enacted) to address eligibility disparities between TRICARE, CHAMPVA, and the Patient Protection and Affordable Care Act (ACA), *see* Secretary's June 1, 2020, Br. at 6-8 (collecting introduced legislation). Although the Court did not ultimately review these legislative documents in deciding the underlying appeal, *see Petite*, 35 Vet.App. at 72-73, they suggest, at a minimum, that the Secretary's position was not unreasonable. *See Patrick*, 668 F.3d at 1330-31 (looking to legislative history to determine whether the Secretary's position was substantially justified). Likewise, his administrative position, which mirrored his litigation position, was consistent with VA policy, both historically and since the enactment of the ACA. *See* Secretary's Substitute Br. at 20 (citing VA's FY2021 budget submission to Congress, which "proposed legislative changes to increase the maximum age for children eligible for medical care under CHAMPVA up to age 26 regardless of student or marital status"); *see also Butts*, 28 Vet.App. at 83-84 (considering consistency with VA policy when assessing whether the Secretary's position was substantially justified). These factors also weigh in favor of a finding of substantial justification.

In sum, considering the totality of the circumstances, the Court concludes that the Secretary's position in this case at the administrative and litigation stages was not unreasonable.

See Butts, 28 Vet.App. at 79-80. Therefore, the Court will deny Ms. Petite's EAJA application because the Secretary's position was substantially justified. *See Felton*, 7 Vet.App. at 286; *Stillwell*, 6 Vet.App. at 303-04.

III. CONCLUSION

Upon consideration of the foregoing, Ms. Petite's application for attorney fees and expenses is DENIED.

DATED: November 21, 2022

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