MOTION DENIED

Margaret Bartley
Chief Judge
January 5, 2023

Kenneth M. Carpenter
CARPENTER, CHARTERED
1525 Southwest Topeka Boulevard
Post Office Box 2099
Topeka, Kansas 66601-2099
(785) 357-5251

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

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

Ms. Petite's Motion For Reconsideration

Pursuant to Vet.App. R. 35(a), Ms. Petite moves the Court for reconsideration of its decision of November 21, 2022, denying her EAJA application.

Introduction: "Overlooked or Misunderstood"

In support of Ms. Petite's Motion, she submits that the Court's decision of November 21, 2022, misunderstood the basis for the Board's August 2019 decision

denying her 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.

This Court's decision concluded that the Secretary's position at both the administrative and litigation phases had a reasonable basis in law and fact and, thus, was substantially justified. Court's November 21, 2022 decision, p. 3. This Court's decision overlooked that the Board's decision relied upon the provisions of 38 C.F.R. § 3.57(a)(1)(iii) must be on a fulltime basis. RBA 4. The Board also relied upon CHAMPVA Policy Manual Chapter 1, Section 2.5 II. B. *Id.* This position was not substantially justified and the Secretary has not shown otherwise.

The Board did not rely upon a belief that the provisions of 38 U.S.C. § 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 § 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 § 1781(c), a CHAMPVA retention provision that expressly mentions individuals pursuing a fulltime course of instruction.

Thus, the Board's administrative position was based entirely upon the provisions of 38 C.F.R. § 3.57(a)(1)(iii) must be on a fulltime basis which was not substantially justified. The Secretary's litigation position was quite different and may have been substantially justified. However, the Board's administrative position was not substantially justified because its was premised only upon § 3.57(a)(1)(iii) and the Secretary's adjudication manual. Whereas the Secretary's litigation position was based upon a belief that the provisions of 38 U.S.C. § 1781 contained a program-specific definition of "child" for CHAMPVA purposes. While the Board did cite to § 1781, it did so in a very narrow way as shown by the following:

> CHAMPVA benefits are awarded to survivors and dependents of certain veterans pursuant to 38 U.S.C. § 1781. 38 C.F.R. § 17.270(a). Those eligible include the child of a veteran who has been adjudicated by VA as having a permanent and total service-connected disability; and the child of a veteran who (A) died as a result of a service-connected disability, or (B) at the time of death had a total disability permanent in nature. 38 U.S.C. § 1781; 38 C.F.R. § 17.271(a).

RBA 4. The Board did not, as the Secretary did in his litigation position, rely upon an expressed a belief that the provisions of 38 U.S.C. § 1781 contained a program-specific definition of "child" for CHAMPVA purposes and there was not substantially justified on that basis.

The only other reference made by the Board to § 1781 was as follows:

> The Board is bound to follow the controlling regulations, which to date, do not allow for CHAMPVA coverage for a daughter or son of a veteran past age 18 unless they became permanently incapable of self-support before age 18 or unless they are pursuing a full-time course of instruction at an educational institution approved by the Department of Veteran's Affairs. 38 U.S.C. § 1781; 38 C.F.R. §§ 3.57(a)(1), 17.271(a). Accordingly, the instant claim must be denied as a matter of law. *See Sabonis v. Brown*, 6 Vet. App. 426, 430 (1994) (When the disposition of the claim is based on the law, and not the facts of the case, the claim must be denied based on a lack of entitlement under the law).

RBA 6. It is undebatable that the Board's administrative position rested exclusively upon the controlling regulations and not upon a belief that the provisions of 38 U.S.C. § 1781 contained a program-specific definition of "child" for CHAMPVA purposes and was not substantially justified.

Once an allegation of lack of substantial justification is made, the burden is on the Secretary to prove that VA was substantially justified in its administrative and litigation positions. *See Cullens v. Gober*, 14 Vet.App. 234, 237 (2001) (*en banc*); *Locher v. Brown*, 9 Vet.App. 535, 537 (1996). As in *Cullens*, the position of the Secretary was not substantially justified, even though his litigation position may have been so as to preclude an award of EAJA to Ms. Petite.

Ms. Petite respectfully submits that this Court misunderstood the Board's administrative position to have been the same as the Secretary's litigation position which

it was not. Nor did the Secretary show that his administrative position was substantially justified.

Conclusion

Ms. Petite asks that this Court recall and vacate its single judge memorandum decision of November 21, 2022, and reconsider its decision to deny her EAJA application by withdrawing its November 21, 2022 decision and issuing a new decision which grants her EAJA application on the basis that the Secretary's administrative position was not substantially justified.

Respectfully Submitted,

/s/ Kenneth M. Carpenter
Kenneth M. Carpenter
Counsel for Appellant
Florence L. Petite
Electronically filed December 8, 2022.