Designated for electronic publication only

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 18-7000(E)

THURMAN FULLER, JR., 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 Thurman Fuller Jr.'s June 15, 2022, application pursuant to the Equal Access to Justice Act (EAJA),[1] for an award of attorney fees and expenses in the amount of $39,710.30. The Secretary filed a response in opposition to that application, and appellant filed a reply. The Secretary argues that his position was substantially justified and that we should deny the application. In the alternative, the Secretary contests the reasonableness of the fees appellant has requested. Because the Secretary's position at both the administrative and litigation stages of the proceedings was substantially justified, the Court will deny appellant's EAJA application.[2]

I. BACKGROUND

On December 13, 2018, appellant appealed a November 20, 2018, Board of Veterans' Appeals decision that denied entitlement to an effective date before August 1, 2009, for

[1] 28 U.S.C. § 2412(d).

[2] This appeal was addressed substantively in a precedential panel decision. *See Fuller v. McDonough*, 35 Vet.App. 142 (2022). The panel unanimously determined that it was appropriate for the parties' dispute concerning appellant's EAJA application to be resolved by a single Judge.

apportionment of VA benefits to his spouse, Beverly Fuller. In its November 2018 decision, the Board explained that while appellant submitted a March 2004 VA Form 21-686c, Declaration of Status of Dependents, it was not until July 9, 2009, that appellant's spouse applied for apportionment benefits. As a result, the Board concluded that August 1, 2009, was the earliest effective date possible under 38 C.F.R. §§ 3.665(f) (Incarcerated beneficiaries and fugitive felons—compensation), and 3.155(b) (How to file a claim).[3] At the time appellant submitted the March 2004 VA Form 21-686c, he was incarcerated and, unbeknownst to him, the California address that he provided for his spouse was incorrect.

At the heart of this appeal is appellant's pursuit of an earlier effective date for apportionment of VA benefits on behalf of his spouse; however, while the claim was on appeal here at the Court, the matter was sent to panel to address an issue of first impression related to standing.[4] Specifically, the panel considered whether California community property law confers standing on appellant to pursue this appeal of an issue related to his spouse's apportioned VA benefits. In a February 23, 2022, precedential decision, the Court ruled in appellant's favor, holding that because appellant's marriage remained intact with no evidence of planned marital dissolution and the claim at issue benefited both appellant and his spouse such that VA's denial of that claim would result in economic injury to their community property, appellant had standing to pursue the appeal.[5] Having concluded that appellant had standing to pursue the appeal, the Court reviewed the merits of the effective-date claim, set aside the Board's decision, and remanded the matter because the Board failed to provide an adequate statement of its reasons or bases for denying an earlier effective date for apportionment of VA benefits.[6]

In June 2022, appellant filed his EAJA application. In August 2022, the Secretary filed a response conceding that appellant is a prevailing party and that no special circumstances exist that would make an EAJA award unjust. However, the Secretary opposes the application on the ground that his position was substantially justified at both the administrative and litigation stages because VA's conduct with respect to appellant's submission of VA Form 21-686c was reasonable. The

[3] Record (R.) at 11. Until March 24, 2015, VA recognized informal claims if certain requirements were met, including an intent to file a claim for a particular benefit under § 3.155(b). *See Shea v. Wilkie*, 926 F.3d 1362, 1366 n.3 (Fed. Cir. 2019).

[4] *See Fuller*, 35 Vet.App. at 145.

[5] *Id.* at 149-56.

[6] *Id.* at 156-58.

Secretary also contests the reasonableness of the fees and expenses appellant seeks. In reply, appellant argues that the Secretary's position was not substantially justified and that the fees he requested are reasonable.

II. ANALYSIS

A. The Legal Landscape

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.[7] As noted above, the Secretary challenges only whether the Secretary's position was substantially justified and the reasonableness of the fees sought.

The Secretary bears the burden of demonstrating that his position was substantially justified at both the administrative and litigation stages.[8] "Substantially justified" means "justified to a degree that could satisfy a reasonable person."[9] 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.'"[10] Whether the Secretary's position was reasonable is based on the totality of the circumstances; factors relevant to the assessment of substantial justification 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."[11] No one factor is dispositive when determining whether the government's position was substantially justified.[12]

---

[7] *See* 28 U.S.C. § 2412(d)(1)(A), (1)(B), (2)(B); *see also Scarborough v. Principi*, 541 U.S. 401, 407-08 (2004); *Comm'r, I.N.S. v. Jean*, 496 U.S. 154, 158 (1990); *Owens v. Brown*, 10 Vet.App. 65, 66 (1997).

[8] *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.").

[9] *Pierce v. Underwood*, 487 U.S. 552, 565 (1988).

[10] *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.").

[11] *Butts*, 28 Vet.App. at 79 (quoting *Stillwell*, 6 Vet.App. at 302).

[12] *Id.* at 80.

B. The Secretary's position was substantially justified.

Applying established law to the facts of this case, we conclude that the Secretary's position had an objectively reasonable basis in law and fact at both the administrative and litigation phases and, thus, was substantially justified. The standing issue was only contested by the Secretary at the litigation stage of these proceedings because the Board accepted that appellant had the necessary stake in the outcome to proceed before the Board. So, we will consider the substantial question concerning standing only in connection with the litigation stage. However, the merits question is relevant at both the administrative and litigation phases. In that regard, the Secretary maintained that appellant was not entitled to an earlier effective date for apportionment benefits because the VA Form 21-686c that appellant submitted could not be construed as a claim or intent to file a claim by appellant's spouse as the dependent seeking the apportionment benefits.[13] We will consider the Secretary's merits-position at both the administrative and litigation phases.

1. Administrative Phase

During the administrative phase, the Board denied an earlier effective date for apportionment of VA benefits because it found that appellant's spouse did not file a claim seeking apportionment before July 9, 2009, and, therefore, August 1, 2009, was the earliest date for which the law allowed the apportioned benefits award to be effective. The Board explained that while appellant's spouse was eligible to receive an apportionment of benefits before August 2009, as evidenced in VA correspondence from March and April 2004, appellant's spouse did not reply to an April 2004 notice letter from VA until July 2009.[14] The Board relied largely on 38 C.F.R. §§ 3.155 and 3.665 to support its decision and concluded that there were no deficiencies in VA's development of the claim.[15]

The Secretary argues that VA's position during the administrative phase was reasonable. At the time appellant submitted the VA Form 21-686c, there was no indication that the address appellant provided for his spouse was incorrect. VA relied on that address and timely proceeded to contact appellant's spouse so that a claim for apportionment could be made. The Secretary asserts that the plain language of § 3.665 does not require VA to take any additional action when

[13] *Id.* at 148-49.

[14] R. at 8.

[15] *See* R. at 4-12.

there is no evidence of error in the process (i.e., incorrect personal information or letters returned as undeliverable).[16] In support of his argument, the Secretary notes that the Court's decision in this appeal did not conclude that VA's reliance on the address appellant provided for his spouse was unreasonable or contrary to law or VA policy.

We agree with the Secretary. In our decision, we acknowledged that appellant's marriage was intact and there was no evidence of dissolution, even in February 2022. Moreover, when VA was made aware of the incorrect address several years later, it proceeded in a timely manner to ensure that appellant's spouse could receive apportioned benefits without hesitation or delay based on appellant's incarceration. Under the presumption of regularity, it was not unreasonable for the Board to take the position that VA's conduct at that time was not contrary to law or policy or any standard VA practice. Though we found error in the Board's decision, it was because the Board failed to discuss the particular circumstances of appellant's incarceration and whether those circumstances required that VA do more than it did. In reviewing the totality of the circumstances, we therefore conclude the Secretary was substantially justified in the administrative phase of this case.[17]

2. Litigation Phase

During the litigation phase, the Secretary argued that appellant did not have standing to pursue his claim, but even if he did, VA's actions based on the submission of VA Form 21-686c were reasonable and did not support an earlier effective date for apportioned benefits. In support of his standing argument, the Secretary relied on our decisions in *Ferenc v. Nicholson*[18] and *Belton v. Principi*,[19] both of which held that a veteran lacked standing to pursue an appeal of an apportionment decision.[20] And with respect to the effective-date argument, the Secretary argued that VA's actions were consistent with the law under § 3.665, which places the responsibility of applying for apportionment benefits on the dependent.

Though the Court rejected the Secretary's position on standing, it was reasonable to argue that appellant did not have standing in the manner urged by the Secretary. As we already noted,

[16] Secretary's EAJA Response at 7-12.

[17] *Stillwell*, 6 Vet.App. at 302; *see Locher v. Brown*, 9 Vet.App. 535, 537 (1996).

[18] 20 Vet.App. 58 (2006).

[19] 17 Vet.App. 209 (2003).

[20] *See Ferenc*, 20 Vet.App. at 64; *Belton*, 17 Vet.App. at 210-11.

this appeal involved an issue of first impression on a novel question—the effect of state community property law on standing related to congressionally created benefits laws. Though that fact is not dispositive, it weighs in favor of finding substantial justification. The Court had to engage in a complicated assessment of, among other things, state property law, constitutional standing requirements, and the scope of our decisions in *Ferenc* and *Belton*. Moreover, after considering these matters individually, we had to address how state interests and federal interests could be accommodated for certain aspects of VA disability benefits law. The novelty and difficulty of the questions before the Court support the objective reasonableness of the Secretary's position.[21]

Additionally, the Secretary relied on various regulations, statutes, and caselaw (not only from this Court, but also from the Supreme Court) that he argued led to the conclusion that his position was correct.[22] For example, the Secretary relied on decisions from this Court that held that a veteran lacked standing to pursue an apportionment claim or that a veteran did not have a personal stake in the outcome of an apportionment claim, because those benefits do not ultimately belong to the veteran.[23] The Secretary also relied on cases from the Supreme Court that held that VA disability benefits were not to be treated as community property under state law in other situations.[24] The Secretary's reliance on these authorities to support his position that appellant lacked standing was reasonable, even though we now know his position was wrong. And that is particularly so given the lack of controlling precedent on the issue at the time of the Board decision and during litigation at this Court.[25] Though the Court ultimately concluded that the cases the Secretary relied on were distinguishable and did not control in the underlying appeal,[26] they at

---

[21] *See Butts*, 28 Vet.App. at 80; *Felton v. Brown*, 7 Vet.App. 276, 281 (1994); s*ee also Bates v. Nicholson*, 20 Vet.App. 185, 192 (2006) (concluding that 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").

[22] *Fuller*, 35 Vet.App. at 148-49.

[23] Secretary's Brief (Br.) at 5-6 (first citing *Ferenc*, 20 Vet.App. at 58; then citing *Belton*, 17 Vet.App. at 209).

[24] *See Fuller*, 35 Vet.App. at 148-49 (first citing *Mansell v. Mansell*, 490 U.S. 581 (1989); then citing *Howell v. Howell*, 581 U.S. 214 (2017)).

[25] *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*'" (quoting *Citizens for Env't Quality v. United States*, 731 F. Supp. 970, 997 (D. Colo. 1989) (emphasis in original))); *Stillwell*, 6 Vet.App. at 303 (noting, in denying an application for EAJA, 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").

[26] *See Fuller*, 35 Vet.App. at 154-55.

least suggest that the Secretary's position was objectively reasonable, such that his position was substantially justified.

In his reply, appellant argues that the Secretary's litigation position on standing was not substantially justified. Appellant largely relies on the fact that the Board, in an August 2022 decision, ultimately provided appellant the relief he had been seeking—an earlier effective date for his spouse's apportionment of VA benefits, and it determined that the VA Form 21-686c he submitted in March 2004 was an informal claim for the apportionment of VA benefits for his spouse. That development is certainly good news for appellant and his spouse. However, it does not help appellant's argument about his EAJA application. The Board's August 2022 decision was not before the Court when it issued its decision in February 2022, because it did not yet exist. In *Stillwell*, we made clear that the substantial justification test requires the Secretary to

> demonstrate the reasonableness, in law and fact, of the position of the VA in a matter before the Court, and of the action or failure to act by the VA in a matter before the VA, based upon the totality of the circumstances, . . . *as reflected in the record on appeal and the filings of the parties before the Court.*[27]

Moreover, we explained that "the 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*."[28] Because the Board's August 2022 decision was issued *after* the matter concluded at the Court, we cannot consider it for the purposes of EAJA. The later decision does not change the agency's actions or the Secretary's position at the time of the Court's February 2022 decision, which forms the basis of our EAJA determination.

* * * * *

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.[29] Because the Secretary's position was substantially justified, we need not address the reasonableness of fees requested. Therefore, the Court will deny appellant's EAJA application.[30]

---

[27] 6 Vet.App. at 302 (emphasis added); *see also Felton*, 7 Vet.App. at 280.

[28] *Stillwell*, 6 Vet.App. at 302.

[29] *See Butts*, 28 Vet.App. at 79-80.

[30] *See Felton*, 7 Vet.App. at 286; *Stillwell*, 6 Vet.App. at 303-04.

III. CONCLUSION

Upon consideration of the foregoing, appellant's EAJA application is DENIED.

DATED: February 7, 2023

Copies to:

Samuel W. Apicelli, Esq.

VA General Counsel (027)