IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

STANLEY L. DAVIS,	)	
	)	
Appellant,	)	
	)	
v.	)	Vet. App. No. 18-4371(E)
	)	
DENIS MCDONOUGH,	)	
Secretary of Veterans Affairs,	)	
	)	
Appellee.	)	

SECRETARY'S RESPONSE TO APPELLANT'S APPLICATION FOR ATTORNEY'S FEES AND EXPENSES

ISSUES PRESENTED

Whether the Court should deny Appellant's Equal Access to Justice Act (EAJA) application for fees and expenses where the remand he received was entirely due to a new legal development and was not based on any administrative error, and, therefore, did not confer prevailing party status on Appellant.[1]

Whether the Court should deny Appellant's EAJA because the Secretary's position was substantially justified.

STATEMENT OF THE CASE

Appellant seeks EAJA fees and expenses totaling $7,125.03, in connection with his appeal of a June 1, 2018, decision of the Board of Veterans' Appeals (Board) that denied him entitlement to an effective date prior to February 27, 2009, for the grant of service connection for lupus. *See* August 24, 2023, Amended EAJA

[1] The Secretary concedes that the Court has jurisdiction over this matter pursuant to 38 U.S.C. § 7261(a)(1) and 28 U.S.C. § 2412(d)(2)(F). Moreover, Appellant's application for fees and expenses satisfies the jurisdictional requirements of 28 U.S.C. § 2412. The Secretary does not challenge the rate of compensation sought.

Application. Appellant filed his opening brief on May 9, 2019, in which he primarily challenged the Board's denial of an earlier effective date for his service-connected lupus under 38 C.F.R. § 3.156(b)[2] and 38 C.F.R. § 3.156(c)[3]. *See* Appellant's Brief (App. Br.), at 1-16. With respect to § 3.156(c), he argued that the Board applied an incorrect legal standard for assessing relevance of additional service treatment records that existed and had not been associated with the claims file when VA first decided the claim, warranting remand. *Id*. at 13-14. In its decision on appeal, the Board relied on the U.S. Court of Appeals for the Federal Circuit's decision in *Kisor v. Shulkin*, 869 F.3d 1360 (Fed. Cir. 2017) (*Kisor I*) when it adjudicated the § 3.156(c) issue.

The Secretary filed a brief on July 8, 2019, and asked the Court to affirm the Board's decision because Appellant had not persuasively demonstrated clear error with regard to the decision on appeal. *See* Secretary's Brief (Sec. Br.) at 7. In response to Appellant's argument that the Board misapplied 38 C.F.R. § 3.156(c), the Secretary maintained that the Board properly applied the law in finding the newly obtained service treatment records were not relevant, but rather cumulative of the evidence already of record, citing to *Kisor I*. *Id*. at 21-24. Appellant filed a

[2] Section 3.156(b) provides: "New and material evidence received prior to the expiration of the appeal period, or prior to the appellate decision if a timely appeal has been filed . . . will be considered as having been filed in connection with the claim which was pending at the beginning of the appeal period."

[3] Section 3.156(c) (1) provides: "[A]t any time after VA issues a decision on a claim, if VA receives or associates with the claims file relevant official service department records that existed and had not been associated with the claims file when VA first decided the claim, VA will reconsider the claim."

reply brief on September 4, 2019, in which he, in relevant part, argued that the Board's analysis contradicts the Court's holding in *Emerson v. McDonald*, 28 Vet.App. 200, 210 (2016), that "based on the plain language of § 3.156(c)(1), upon receiving official service department records in 2012, VA was required to 'reconsider the claim' for service connection for posttraumatic stress disorder that was denied in February 2003, notwithstanding the fact that service connection for PTSD was granted in 2011." *See* Appellant's Reply Brief (App. Reply Br.) at 7-8.

The case was argued before the Court on June 25, 2020, and on May 18, 2021, the Court issued a panel decision affirming the portion of the Board's decision denying an earlier effective date under § 3.156(b) and vacating the portion of the decision denying an earlier effective date under § 3.156(c), remanding "for the Board to reconsider the question in light of intervening relevant legal authority." *See Davis v. McDonough*, 34 Vet.App. 131, 132 (2021). With respect to Appellant's argument regarding § 3.156(c), the Court noted that the Federal Circuit first addressed the meaning of the word "relevant" in *Kisor I*, and it acknowledged that the June 2018 Board's § 3.156(c) analysis cites that September 2017 *Kisor I* decision. *Id*. at 139. However, the Court explained, *Kisor I*, which the Board relied upon in its June 1, 2018, decision, was subsequently vacated by the Supreme Court in June 2019 in *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019) (*Kisor II*), and the Federal Circuit issued another decision in August 2020 in *Kisor v. Wilkie*, 969 F.3d 1333 (Fed. Cir. 2020) (*Kisor III*). *Id*. Then, in April 2021, the Federal Circuit granted a petition for panel rehearing, denied a petition for full-court review, and issued

Kisor v. McDonough, 846 Fed. Appx. 917 (Fed. Cir. 2021) (*Kisor IV*), which modified *Kisor III*. *Id*.

The Court recognized that "[n]either party has brought the post-*Kisor I* decisions to our attention, much less asked for the opportunity to address them. And the briefing in this case, having been completed long before *Kisor III* and *Kisor IV* were decided, focuses exclusively on *Kisor I*." *Id*. at 139-40. The Court explained: "In circumstances where there has been a new legal development between the issuance of a Board decision and the submission of a case to the Court, we have the discretion not to address the effect of that development and instead remand for the Board to consider it in the first instance." *Id*. at 140 (citing *Robinson v. O'Rourke*, 891 F. 3d 976, 983 (Fed. Cir. 2018)). The Court held that "[t]hat course is appropriate here," specifically stating:

> The Board did not have the benefit of the Federal Circuit's latest decision on the "relevant" standard when it adjudicated the § 3.156(c) issue. Allowing the Board to consider *Kisor IV* in the first instance and apply the most recent law on this subject to the facts may moot any error Mr. Davis alleges the Board made when it relied on *Kisor I*. Accordingly, we vacate the portion of the decision denying an earlier effective date under § 3.156(c) and remand for the Board to readjudicate the matter in light of *Kisor IV*. For the sake of completeness, we urge the Board when readjudicating to consider any germane arguments presented in the parties' briefs in this appeal.

Id.

The Court issued judgment on June 10, 2021. Appellant filed his appeal to the Federal Circuit on August 5, 2021, and on February 14, 2023, the Federal Circuit dismissed the appeal for lack of jurisdiction since the Court's decision was not final. *See* Federal Circuit Judgment. The Court issued mandate on May 16,

2023, effective May 15, 2023. On June 13, 2023, Appellant filed a timely EAJA application for attorney's fees and expenses pursuant to 28 U.S.C. § 2412(d), seeking a total of $9,542.39 in fees and expenses. *See* Appellant's EAJA Application (EAJA App.), at 1-13. On August 24, 2023, Appellant filed an amended EAJA application. (Amended EAJA App.). Appellant, through counsel, seeks a total of $7,125.03 in fees and expenses. *Id*. at 1.

SUMMARY OF ARGUMENT

The Court should deny Appellant's application for attorney fees because he is not a prevailing party. The Secretary has not conceded the existence of any administrative error in this litigation and the Court's decision contains no finding of such error. Appellant has the burden of demonstrating that he is a prevailing party, and, as he fails to meet that burden, the Court should deny his EAJA application. Further, the Court should deny the application because the Secretary's position was substantially justified.

ARGUMENT

I. The Court should deny Appellant's EAJA application because he is not a prevailing party.

A claimant seeking attorney fees under EAJA must show that (1) he or she is a "prevailing party," (2) the Secretary's position was not "substantially justified," and (3) there are no "special circumstances" that would make an award unjust. 28 U.S.C. § 2412(d). The burden is on the applicant to demonstrate his or her prevailing party status. *Johnson (Leamon) v. Principi*, 17 Vet.App. 436, 439 (2004).

To achieve prevailing party status under EAJA, the claimant must have received "'at least some relief on the merits of [his or her] claim.'" *Davis v. Nicholson*, 475 F.3d 1360, 1363 (Fed. Cir. 2007) (quoting *Buckhannon Bd. & Care Home, Inc. v. W.Va. Dep't of Health & Human Res.*, 532 U.S. 598, 603-04 (2001)). The prevailing party requirement may be met when a party "obtained a court order carrying sufficient 'judicial imprimatur' to materially change the legal relationship of the parties." *Rice Servs., Ltd. v. United States*, 405 F.3d 1017, 1026 (Fed. Cir. 2005). As this Court has held, a remand "for the Board to consider [an] issue raised for the first time on appeal . . . does not, by itself, confer prevailing-party status on [an] appellant." *Gordon v. Principi*, 17 Vet.App. 221, 224 (2003). Because a Court-ordered remand does not necessarily lead to relief on the merits, only "remands based on [the court's] recognition of agency error . . . confer prevailing party status." *Davis*, 475 F.3d at 1364 (citing *Kelly v. Nicholson*, 463 F.3d 1349, 1354 n.3 (Fed. Cir. 2006)).

Thus, a remand to the Board for additional proceedings may confer prevailing party status upon a litigant, "but only if the remand is predicated—either explicitly or implicitly—on administrative error." *Robinson v. O'Rourke*, 891 F.3d 976, 980-81 (Fed. Cir. 2018); *see Davis*, 475 F.3d at 1364*; see also Dover v. McDonald*, 818 F.3d 1316, 1319 (Fed. Cir. 2016) ("[W]here the remanding court has not retained jurisdiction, a remand to an administrative agency is relief on the merits if the remand was necessitated by agency error, and the remand calls for further agency proceedings."). To determine whether a Court remand was

predicated on Board error, the Court must first examine the underlying merits decision. *See Blue v. Wilkie*, 30 Vet.App. 61, 66 (2018) ("The face of the underlying merits decision sets the stage for a subsequent for EAJA determination.").

In cases where there is no explicit finding of administrative error and no concession of error, "the default rule is that the remand is not based on administrative error for EAJA purposes." *Davis*, 475 F.3d at 1366. However, the Court is not limited to the four corners of the remand in assessing whether there was Agency error. *See id*. at 1365; *Blue*, 30 Vet.App. at 69. Instead, the Court must consider the nature and context of the remand. *See Gurley v. Peake*, 528 F.3d 1322, 1327-28 (Fed. Cir. 2008); *see also Blue*, 30 Vet.App. at 69. In these cases, the burden is on the EAJA applicant to prove, based on the record, that the remand must have been predicated on administrative error despite the absence of an explicit finding of error. *See Davis*, 475 F.3d at 1366.

Generally, "an appellant who receives a remand solely because of a change in caselaw during the pendency of his or her appeal is not an EAJA prevailing party." *Flemming v. Principi*, 16 Vet.App. 52, 53 (2002); *see also Akers v. Nicholson*, 409 F.3d 1356, 1359 (Fed. Cir. 2005). Remands for the Board to consider new law in the first instance, and not based on administrative error, do not materially change the parties' relationship. *See Akers*, 409 F.3d at 1359; *see also Robinson*, 891 F.3d at 980-81. An exception to this general rule allows an EAJA applicant to be considered a prevailing party when the Court applies the intervening case in the decision for which an EAJA award is sought. *Conley v.*

Wilkie, 30 Vet.App. 224, 228 (2018) ("Where the Court applies an intervening decision to the facts of a pending appeal and remands the case because of that application, the remand is predicated on administrative error, even in the absence of an explicit finding of error.").

Here, Appellant failed to meet his burden of demonstrating prevailing-party status under the EAJA. *See Davis*, 475 F.3d at 1366. The Court here did not award the benefits sought and Appellant does not argue that he is a prevailing party on that basis. He instead asserts that he is a prevailing party because the Court remanded his case for the Board to "readjudicate the matter in light of *Kisor IV*." Amended EAJA App. at 5. Specifically, he states that "[t]his remand was not predicated upon a change in law after the Board's decision or upon the need for the Board to consider a newly raised issue or new evidence discovered while the case was on appeal." *Id*. (citing *Zuberi v. Nicholson*, 19 Vet.App. 541, 547 (2006)) (emphasis is original). "Instead, this remand is premised on the Board legal obligations to apply the correct interpretation of § 3.156(c) as articulated in *Kisor*." *Id*.

Appellant's contention, however, mischaracterizes the Court's actual basis for remand. *See Davis v. McDonough*, 34 Vet.App. 131, 139-40 (2021). Specifically, the Court did not find that the Board applied an *incorrect* interpretation of *Kisor*. *See* Amended EAJA App. at 5; *but see Davis*, 34 Vet.App. at 130-40. Instead, the Court exercised its discretion to remand the matter "as appropriate" for the Board to address a new legal development, specifically, a newly decided

Kisor IV, and "to consider it *in the first instance*." *Id*. (explaining that *Kisor III* and *IV* were decided long after briefing was completed in this case and citing to *Robinson v. O'Rourke*, 891 F. 3d 976, 983 (Fed. Cir. 2018)) (emphasis added). The Court's remand, thus, was not based on the Board's incorrect interpretation, or any other error, in the administrative decision on appeal.

Appellant, thus, fails to show that the Court's May 2021 decision was based, either explicitly or implicitly, on a finding of administrative error. At no time during this litigation did the Secretary concede any administrative error, and Appellant does not argue to the contrary. In addition, nothing in the Court's decision shows that the Court found error in the Board decision on appeal. *See Davis*, 34 Vet.App. at 139-40; *see also Davis*, 475 F.3d at 1366 (declining to find an implicit admission of administrative error because "nothing in the *Davis* Remand Order or the evidentiary record clearly indicates" that the remand was based on administrative error). The Court also did not apply or consider a new legal development. *See Conley*, 30 Vet.App. at 228.

Instead, the Court simply exercised its discretion to remand the matter for the Board to address, in the first instance, a new legal development. *See* Davis, 34 Vet.App. at 139-40. In fact, the Court clearly indicated that there had been new legal development *after* the Board's decision and briefing in this case, so remand was warranted for the Board to consider *Kisor IV* for the first time in this matter. *Id*. "It would not be reasonable to conclude that the remand . . . was predicated upon administrative error when . . . the Board [] applied the law in effect at the time of its

[] decision." *Sachs v. Principi*, 15 Vet.App. 414, 416 (2002). Accordingly, the May 2021 remand did not confer prevailing party status. *See Flemming*, 16 Vet.App. at 53; *see also Robinson*, 891 F.3d at 985 ("Even if the Veterans Court's remand decision compelled the Board to consider new evidence and arguments on remand, the decision did not materially alter the relationship between the parties.") (emphasis omitted).

"In cases where there is no explicit finding of administrative error and no concession of error, 'the default rule is that the remand is not based on administrative error for EAJA purposes.'" *Conley*, 30 Vet.App. at 227 (quoting *Davis*, 475 F.3d at 1366). In such cases, the burden to establish that the remand was based on administrative error is on the EAJA applicant. *Id.* Here, Appellant does not provide *any* assertion as to how there was administrative error, besides his incorrect suggestion that the Board applied the incorrect interpretation of § 3.156(c) "as articulated in *Kisor*." *See* Amended EAJA App. at 5. Notably, he does not specify the *Kisor* decision to which he is referring. And Appellant fails to address that the Court's remand was predicated on the intervening Supreme Court and Federal Circuit decisions in *Kisor II*, *Kisor III*, and *Kisor IV*, despite Appellant failing to raise any argument before the Court regarding the intervening decisions since the Board first issued its decision in June 2018 applying *Kisor I*, the precedential caselaw in effect at the time of the Board's decision.

In *Akers*, the Federal Circuit explained the distinction between when a claimant may be entitled to EAJA fees even when a remand was predicated on a

change in law, and when the claimant is not. *See generally Akers v. Nicholson*, 409 F.3d 1356 (Fed. Cir. 2005). More specifically, the Federal Circuit explained that the question had to be whether there was an adjudication on the merits of the claim, and thus, whether the appellant received any adjudication on the merits of the claim on that basis. *See id.* at 1359-60. When a claimant receives a remand solely because "he is the beneficiary of the retroactive application of a favorable statement of law[, that does] not constitute administrative error." *Flemming*, 16 Vet.App. at 55 (Greene, J., concurring). This Court has further clarified that a claimant may be a prevailing party based on a change in law in circumstances where the Court specifically determines that the remand is not just for application of the newly issued case to the case on appeal in the first instance, but rather the Court applies the new case and, on the merits and grants the relief sought. *See Conley*, 30 Vet.App. at 229 (finding administrative error where "the Court did not remand the case solely for the Board to address *Cook* in the first instance, but instead found that *Cook* applied to Mr. Conley's case, *and* that he was due a Board hearing.").

This case is more akin to the facts of *Akers*. Here, the Court found that *Kisor IV* was relevant to Appellant's case, explained why it made that determination, and specifically stated that it was using its discretion "not to address the effect of that [new legal] development and instead remand for the Board to consider it in the first instance." *See Davis*, 34 Vet.App. at 140. Thus, although the Court noted that *Kisor IV* may be applicable to Appellant's claim, the Court did not fully apply *Kisor IV* to

Appellant's claim such that he received relief on the merits. *See Akers*, 409 F.3d at 1359-60. Critically, the Secretary cannot reasonably have erred based entirely on caselaw that had not yet been passed by this Court, the Federal Circuit, or the Supreme Court. *Sachs*, 15 Vet.App. at 416. Therefore, for purposes of determining whether Appellant is entitled to an award of attorney fees and expenses under the Equal Access to Justice Act, Appellant has not met his burden of showing prevailing party status under the Court's case law. Accordingly, the Court should deny his EAJA application. *See* 28 U.S.C. § 2412(d)(1)(A).

II. The Secretary's position was substantially justified at both the administrative and litigation stages.

In the alternative, the Court should deny Appellant's EAJA application because the Secretary's position was substantially justified. 28 U.S.C. § 2412(d)(1)(A). 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 of 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, 108 S. Ct. 2541, 101 L. Ed. 2d 490 (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 *Pierce*, 487 U.S. at 566 n.2). Whether the Secretary's position was reasonable is based on the totality of 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 circumstance." *Butts*, 28 Vet.App. at 79 (quoting *Stillwell*, 6 Vet.App. at 302). No one factor is dispositive. *Id*. at 80.

Here, the Secretary's litigation position was substantially justified based on the totality of the circumstances and a reasonable basis rooted in the law and facts. As discussed above, the Court's remand of the portion of the Board's decision denying an earlier effective date under § 3.156(c), on the basis that the Board apply, in the first instance, the intervening *Kisor IV* case, without finding error, reflects this. *Davis*, 34 Vet.App. at 139-40. Further, the Court noted in its decision that Appellant did not bring the post *Kisor I* decisions to the Court's attention or ask for an opportunity to address them. *Id*. at 139. At the administrative level in the instant case, the Secretary was substantially justified because the Board completely and appropriately addressed the issue before it, based on *Kisor I*, which was the law applicable at the time of the Board's June 1, 2018, decision. *See Sachs*, 15 Vet.App. at 416 (explaining remand is not predicated on administrative error "when . . . the Board [] applied the law in effect at the time of its [] decision."). Thus, considering the totality of the circumstances, the Secretary's position in this

case at both the administrative and litigation stages was not unreasonable. *See Butts*, 28 Vet.App. at 79-80. Accordingly, the Court must deny Appellant's EAJA application because the Secretary's position was substantially justified. *See Stillwell*, 6 Vet.App. at 303-04.

CONCLUSION

WHEREFORE, based on the foregoing, the Secretary respectfully requests that the Court deny Appellant's EAJA application because Appellant was not a prevailing party. In the alternative, the Court should deny the application because the Secretary's position was substantially justified.

Respectfully submitted,

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