UNITED STATES COURT OF VETERANS APPEALS

NO. 94-687

LEONA PELLERIN, APPELLANT,

V.

JESSE BROWN,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

On Appellant's Application for Attorney Fees and Expenses

(Decided)

William G. Smith was on the pleadings for the appellant.

Mary Lou Keener, General Counsel; *Ron Garvin*, Assistant General Counsel; *David W. Engel*, Deputy Assistant General Counsel; and *A. M. Fent* were on the pleadings for the appellee.

Before NEBEKER, *Chief Judge*, and KRAMER and HOLDAWAY, *Judges*.

HOLDAWAY, *Judge*, filed the opinion of the Court. KRAMER, *Judge*, filed a dissenting opinion.

HOLDAWAY, *Judge*: The appellant has applied for attorney fees and expenses under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d)(2)(F). The Court will deny the appellant's EAJA application because the position of the Secretary was substantially justified.

I. FACTUAL BACKGROUND

On April 29, 1994, a Board of Veterans' Appeals (BVA or Board) decision in the case of Alcide D. Pellerin, the veteran, determined that no new and material evidence had been submitted to reopen a claim of entitlement to service connection for lumbar spine and right leg disorders. The evidence submitted in an effort to reopen the veteran's claims included the veteran's testimony at a May 1989 hearing. In the Board's decision, one of the reasons given for the refusal to reopen was

that the Board refused to accept the veteran, a physician, as an expert witness because of his "stake in the outcome." *Alcide D. Pellerin*, BVA 89-39449, at 11 (Apr. 29, 1994). On August 22, 1994, the veteran appealed the Board's decision to this Court. In October 1994, the Secretary informed the veteran that he planned to move for remand. Shortly thereafter, the veteran retained representation. On March 15, 1995, the parties filed a joint motion proposing that the Board's decision be vacated and the matter remanded for readjudication. The joint motion stated:

> The motion is based on an evidentiary issue of first impression before this Court, but is foreshadowed by the Court's jurisprudence on reopened claims generally. In the decision on appeal, the BVA refused to treat the testimony of [the] appellant, a trained physician, as expert witness evidence, because of his self-interest in the outcome. On this basis, *among others*, the BVA refused to reopen his claims. However, the parties agree that where a physician-appellant chooses to act as his own medical expert, the BVA must consider his testimony as expert evidence, although the BVA is not bound to accept such testimony as determinative. Because the BVA refused to consider [the] appellant's testimony for reopening purposes, the present appeal should be remanded for readjudication.

Motion at 1 (emphasis added). As a basis for the parties' conclusion, the joint motion cited, inter alia, *Justus v. Principi*, 3 Vet.App. 510 (1992), and *Espiritu v. Derwinski*, 2 Vet.App. 492 (1992). On March 20, 1995, the Court, in a single judge action, granted the joint motion, vacated the Board's decision, and remanded the matter.

On April 10, 1995, the veteran filed the EAJA application that is the subject of this decision. In the application, he (1) made a showing that he was a "prevailing party" by asserting such status and by demonstrating how he had attained such status; (2) made a showing that he is a party eligible for an award under the EAJA by stating that his net worth was less than $2,000,000 when the appeal was filed on August 22, 1994; (3) asserted that the position of the Secretary was not substantially justified; and (4) included an itemized statement of the fees and expenses sought (43.1 hours at a rate of $122.38 per hour, for a total fee of $5,274.58, and an additional $65.52 for expenses--total amount of fees and costs, $5,340.10) supported by an affidavit from the veteran's counsel. Because the veteran satisfied the jurisdictional content requirements of 28 U.S.C. § 2412(d)(1)(B) within the applicable 30-day application period, his EAJA application was timely. *See Bazalo v. Brown*, 9 Vet.App. 304, 310 (1996) (en banc); *see also Locher v. Brown*, 9 Vet.App. 535, 537 (1996).

On April 26, 1995, counsel for the appellant notified the Court that the veteran, Alcide D.

Pellerin, had died on April 16, 1995. On May 11, 1995, counsel for the appellant filed a motion to substitute Leona Pellerin, widow of the veteran, pursuant to *Cohen v. Brown*, 8 Vet.App. 5 (1995). On May 17, 1995, the Court granted the appellant's motion.

On October 6, 1995, the Secretary filed a response to the appellant's application. He argues that the appellant's request for fees should be denied because the position of VA was substantially justified in the underlying merits administrative decisionmaking and in the litigation in this Court, and that there are special circumstances that make an attorney fees award unjust. He also argues that, in the event the appellant is determined to be entitled to an EAJA award, the fees requested are excessive and should be reduced. The appellant has not raised the issue of the reasonableness of the Secretary's position before the Court, but relies entirely on the "unreasonableness" of the BVA's "position." In light of our determination that the BVA's position was reasonable, the issues as to special circumstances and the excessiveness of the fees requested need not be addressed.

II. ANALYSIS

Because the appellant has alleged that VA's position was not substantially justified, the burden to establish substantial justification rests with the Secretary. *See Olney v. Brown,* 7 Vet.App. 160 (1994); *Stillwell v. Brown,* 6 Vet.App. 291 (1994). Although this burden rests with the Secretary, it is well to note that the Supreme Court, in defining "substantially," stated, "We are of the view . . . that as between the two commonly used connotations of the word 'substantially,' the one most naturally conveyed by the phrase before us here is not 'justified to a high degree,' but rather 'justified in substance or in the main'--that is, justified to a degree that would satisfy a reasonable person." *Pierce v. Underwood,* 487 U.S. 552, 565 (1988). In this connection, this Court in *Stillwell* noted specifically that in assessing the "reasonableness" of the Government's position, "the evolution of VA benefits law since the creation of this Court has often resulted in new, different, or more stringent requirements for adjudication. . . . [S]ome cases before this Court are ones of first impression involving good faith arguments of the government that are eventually rejected by the Court." *Stillwell,* 6 Vet.App. at 303. This Court cited with approval the following language from *Roanoke River Basin Ass'n v. Hudson,* 991 F.2d 132, 139 (4th Cir. 1993), *cert. denied*, 510 U.S. 864 *(*1993), that even with respect to cases which are not of first impression: "While the EAJA redresses

governmental abuse, it was never intended to chill the government's right to litigate or to subject the public fisc to added risk of loss when the government chooses to litigate reasonably substantiated positions, whether or not the position later turns out to be wrong." *Stillwell*, 6 Vet.App. at 303.

Turning to the application of these general principles to this case, we must first determine what exactly was the position of the BVA now under attack and whether that position was "in the main" justified. *Pierce, supra*. As to the first issue, the precise position that the BVA took was that the appellant had failed to produce new and material evidence. One of the BVA's reasons, of several given, for not finding the evidence to be either new or material, was its refusal to accord the appellant-physician status as an "expert witness" insofar as his own "testimony" was concerned. Other reasons given included a failure, assuming, inter alia, the relevance and probativeness of the appellant's testimony, to present a "reasonable possibility" of changing the result given the context of the "old" evidence which included highly persuasive evidence from other physicians who were both specialists and, of course, neutral. A further reason for rejecting the "new" evidence, including much, if not all, of the appellant-physician's own testimony, was its cumulativeness. Dr. Pellerin had been his own witness in the former finally denied proceeding. Considering the BVA's decision in its entire context, it simply cannot be said that the position of the BVA, i.e., that new and material evidence was not presented, was decisively or even primarily affected by its rejection of the appellant's "expert" testimony. When read in its entirety, the decision, which was exceedingly detailed and thorough and which looks very much like a de facto reopening, appears to be an alternative or "make weight" justification rather than the *raison d'etre* for finding a lack of new and material evidence. In point of fact, as previously noted, in the part of its analysis preceding the language as to the appellant's expertise and "stake" in the case, the BVA expressly assumed his testimony's relevance and probativeness, for purposes of its "reasonable possibility" analysis. The "reasonable possibility" analysis was the principal *ratio decidendi* of its decision rather than the subsidiary issue as to the appellant's expertise. In this connection, it must be noted that the joint remand motion, agreed to by the appellant and his counsel, conceded that refusing to accord expertise to the appellant was only one basis "among others" for the BVA's refusal to reopen. In sum, it does not appear that the issue of the appellant's expertise was in any way decisive in the BVA's ultimate position that new and material evidence had not been presented.

Nonetheless, for whatever reasons, the Secretary elected to move for a remand solely because of the "failure" to accord expert status to the appellant's testimony, even though, somewhat inconsistently, he recognized that the decision of the Board was based at least in part on other considerations. In so doing, and as agreed to by the appellant and his counsel, it was specifically conceded that the issue presented was a case of first impression. The parties also agreed that this case of first impression was "foreshadowed by the Court's jurisprudence on reopened claims generally." It is difficult to imagine what this latter point means. Obviously, all cases that come before this Court, of first impression or otherwise, are "foreshadowed" by the cases that have been decided beforehand. That is the process of law by *stare decisis*. It is in the give and take of the adversary process that the necessary refinements are made and "glosses" added to existing precedent, thus creating new precedent in analogous but distinguishable cases. In this instance, an exceedingly novel issue was presented: the claimant, himself a physician, giving expert, but obviously non-neutral, evidence in his own case. That was a fact situation not presented by *Justus*, *supra*, where a neutral expert was involved in disputing other neutral experts. In any event, a concession by the appellant that this novel case was a case of first impression is necessarily also a concession that, while analogous, the case was distinguishable and could not be decided except as an extension of *Justus*, i.e., a new precedent. Of course, it would have been preferable had the BVA explicitly recognized *Justus* and either "followed" it, which probably would have made no difference as to the outcome in any event, given the "make weight" nature of the expertise determination, *supra,* or "distinguished" it. *Cf. Kightly v. Brown*, 6 Vet.App. 200 (1994); *Reonal v. Brown*, 5 Vet.App. 458 (1993). These two cases are illustrative of instances where this Court accepted pre-opening credibility determinations.

Our dissenting colleague states that this case does not fit into any of the recognized exceptions to the *Justus* rule. However, the majority disagrees. In *Reonal*, the presumption of credibility did not arise because the physician "relied upon appellant's account of his medical history and service background, recitations which had already been *rejected*" by the regional office. *Reonal*, 5 Vet.App. at 460-61 (emphasis in the original). In *Kightly*, the opining physician's statement was rejected because it was found to be based on an "inaccurate history" as given by the veteran. *Kightly*, 6 Vet.App. at 206. In the present case, the physician-veteran is similarly relying on a medical history

and service background that have already been rejected by VA. Accordingly, and despite the Secretary's concession in his December 1994 motion to remand that these exceptions were not applicable, the Court finds that the presumption of credibility should not have arisen, and Dr. Pellerin's testimony could have plausibly been rejected as being based on a veteran's own account and medical history which had previously been rejected by VA. Where the dissent would argue that the "proper course, . . . would have been to accept the veteran's testimony as expert evidence for reopening purposes," the majority holds to the contrary.

The essence of the case boils down to whether this Court should find a lack of substantial justification merely because the BVA, a nonjudicial body, failed to cite a possibly pertinent but not a dispositive case, that the parties have agreed was not directly controlling, and that the BVA therefore, need not have necessarily followed. Extension of the substantial justification doctrine to require citation of analogous cases of first impression is not only unwarranted but would be mischievous to the worthy goal of ensuring that the adversary process is given full freedom to operate in cases of first impression. The adoption of such a drastic rule by assuming, in effect, applicability of noncontrolling but analogous precedent, could easily "chill the Government's right to litigate" in those instances where an issue involves the extension of an existing precedent. *Roanoke River Basin Ass'n*, 991 F.2d at 139. It is to the benefit of all that this process take place in the full light of day and not by remands based on possibly pertinent but clearly distinguishable precedent. Although the Government may ultimately lose in such situations, it should have a fair chance to challenge issues raised without further risk to the public fisc on novel issues of first impression. Because we find that the BVA's position that the appellant failed to produce new and material evidence was not exclusively or even primarily based on failure to accord the appellant expert status and because we find that the issue presented to the BVA was a case of first impression, it is our determination that the Board's decision was "in the main" substantially justified. *Pierce,* 487 U.S. at 565.

III. CONCLUSION

The appellant's application for attorney fees is DENIED.

KRAMER, *Judge*, dissenting:

I.

Because the appellant has alleged that VA's position was not substantially justified, the burden to demonstrate substantial justification rests with the Secretary. *See Olney v. Brown*, 7 Vet.App. 160, 162 (1994); *Stillwell v. Brown*, 6 Vet.App. 291, 301 (1994); *Cook v. Brown*, 6 Vet.App. 226, 237 (1994), *aff'd*, 68 F.3d 447 (Fed. Cir. 1995). The Court has adopted the following test for substantial justification:

> [T]he VA must 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, including merits, conduct, reasons given, and consistency with judicial precedent and VA policy with respect to such position, and action or failure to act, as reflected in the record on appeal and the filings of the parties before the Court.

Stillwell, 6 Vet.App. at 302 (citing *Pierce v. Underwood,* 487 U.S. 552, 565 (1988); *Gavette v. OPM,* 808 F.2d 1456, 1467 (Fed. Cir. 1986); and *Essex Electro Engineers, Inc. v. United States*, 757 F.2d 247, 252 (Fed. Cir. 1985)). In order to prevail, the Secretary must show substantial justification for both his administrative and litigation positions. *See Locher v. Brown,* 9 Vet.App. 535, 537 (1996); *ZP v. Brown*, 8 Vet.App. 303, 304 (1995) (per curiam order); *Felton v. Brown,* 7 Vet.App. 276, 279-80 (1994). The Court has also adopted the Federal Circuit's "reasonableness" test, summarizing the guidelines as follows:

> (1) [R]easonableness is determined by the totality of circumstances, and not by any single-factor approach; (2) reasonableness "turns on what support in law and fact the government offered in defending its case, and . . . the merits of the agency decision constitute only one factor in evaluating the justification for the government's litigating position in court," *Essex,* 757 F.2d at 253 (citation omitted); (3) whether the government "drag[ged] its feet," or "cooperated in speedily resolving the litigation," *id.*; and (4) whether the government "departed from established policy in such a way as to single out a particular private party," *id.* at 254 (citation omitted).

Stillwell, 6 Vet.App. at 302.

II.

As to VA's position in the administrative process, the Secretary argues that the April 29, 1994, BVA decision was reasonable, notwithstanding its error in failing to treat the testimony of the appellant, a trained physician, as expert witness evidence, because this was an evidentiary issue of first impression before this Court. The appellant contends that although an evidentiary issue of first impression existed in this case, it was not an issue that required the Court's interpretation of the law because the law was well settled. For the reasons that follow, I believe that the Secretary's position in the administrative phrase was not reasonable and thus not substantially justified.

Pursuant to this Court's decision in *Espiritu v. Derwinski*, 2 Vet.App. 492 (1992), expert testimony is admissible where the witness is qualified as an expert, and the question before the fact finder involves specialized knowledge. *Id.* at 495. In *Espiritu*, the appellant, in her attempt to reopen her claim for service connection for the cause of her husband's death, submitted statements from her lay neighbors who had not been trained in medicine, that causally linked the husband's death to his service-connected conditions. *Ibid*. The Court found that these statements were not sufficient to reopen the appellant's claim because her neighbors were not capable of providing a probative diagnosis as to the cause of her husband's death. *Ibid*. Moreover, pursuant to this Court's decision in *Justus v. Principi*, 3 Vet.App. 510 (1992), the credibility of evidence submitted to reopen a claim must be presumed. *Id.* at 513. The Court has recognized certain exceptions to the *Justus* rule where the physician's opinion is based upon an inaccurate factual premise (*see Kightly v. Brown*, 6 Vet.App. 200, 206 (1994); *Reonal v. Brown*, 5 Vet.App. 458, 460-61 (1993)), such as where a physician's opinion is formed on the basis of a medical history and service background provided by the veteran but previously rejected by VA (*see Elkins v. Brown*, 5 Vet.App. 474, 478 (1993)). In these cases, the credibility of medical evidence need not be presumed.

In this case, the BVA did not presume the credibility of the testimony as required by *Justus* even though the case did not fit into any of the recognized exceptions to the *Justus* rule, and, contrary to *Espiritu,* did not treat the veteran's testimony as that of an expert witness. Instead, the BVA presumed that the veteran's testimony was not credible "in light of his stake in the outcome of his mission to obtain additional VA compensation." *Pellerin*, BVA 89-39449, at 12 (Apr. 29, 1994). The proper course, according to the Court's case law decided almost two years before the BVA

decision, would have been to accept the veteran's testimony as expert evidence for reopening purposes, then to state fully the reasons or bases for rejecting or accepting such expert testimony in weighing all of the evidence, both old and new. *See Moray v. Brown*, 5 Vet.App. 211, 213 (1993). Admittedly, these cases do not address specifically the factual situation where the appellant is also the expert. Because of this lack of specificity, the majority has determined that the issue is one of first impression and that under *Stillwell* the Secretary's position was substantially justified. However, the Secretary himself has conceded that the BVA acted improperly in not applying the principle that "where a physician-appellant chooses to act as his own medical expert, the BVA must consider his testimony as expert evidence, although the BVA is not bound to accept such testimony as determinative." Joint Motion at 1. The majority notes that the presumption of credibility does not attach because the appellant's medical history, upon which his medical opinion rested, was rejected by VA. I find such a statement indeed curious in view of the following: First, other than the BVA decision, a record on appeal has never been transmitted to the Court, from which such a VA rejection could be determined; and, second, the Secretary's motion for remand in the underlying case specifically indicated that the caselaw cited by the majority, under which the presumption of credibility would not attach, is *not* applicable here, stating that "exceptions to the *Justus* rule are not present here." Secretary's Motion for Remand at 5. My own review of the BVA decision indicates that VA never rejected any factual historical predicate upon which the appellant's medical opinion rested -- only the medical opinion itself. Even assuming the law did not require the application of *Espiritu* and *Justus* to the testimony of a physician-appellant, there simply was no substantial justification for the BVA's failure to address this issue. Therefore, I believe that the Secretary's position in the administrative phrase was not reasonable and, thus, not substantially justified.

Finally, I note the majority's seemingly persuasive argument as to why there was substantial justification for the BVA's determination that no new and material evidence had been presented notwithstanding the BVA's failure to address properly the testimony of the veteran, Dr. Pellerin. The majority states:

> Other reasons given included a failure, assuming, inter alia, the relevance and probativeness of the appellant's testimony, to present a "reasonable possibility" of changing the result given the context of the "old" evidence which included highly persuasive evidence from other physicians who were both specialists and, of course,

> neutral. A further reason for rejecting the "new" evidence, including much, if not all, of the appellant-physician's own testimony, was its cumulativeness. Dr. Pellerin had been his own witness in the former finally denied proceeding.

(*ante* at ___, slip op. at 4).

This analysis, however, fails for two reasons. First, it bears little resemblance to the BVA's actual discourse, which I have set forth as an appendix, and for which I ask the reader's indulgence. Second, in essence, the majority states that the BVA's treatment of Dr. Pellerin's testimony is not prejudicial to the appellant. *See* 38 U.S.C. § 7261(b); *Kehoskie v. Derwinski*, 2 Vet.App. 31, 34 (1991). However, even the Secretary, by initiating a joint motion for remand for the specific purpose of requiring the BVA to address Dr. Pellerin's expert testimony rather than asking for affirmance of the BVA decision on the basis of harmless error, concedes that such is not the case.

Having concluded that the Secretary was not substantially justified in his administrative position, there is no need to determine whether the government's litigation position before this Court was substantially justified. *See Locher* and *ZP*, both *supra.*

III.

Pursuant to 28 U.S.C. § 2412(d)(1)(A), a party is not eligible for an award of fees and expenses under the EAJA if the Court determines that "special circumstances make an award unjust." Here, the Secretary argues that special circumstances exist because the parties adopted the Secretary's joint motion for remand and the appellant's attorney made no significant contribution to the proceedings. In *Doria v. Brown*, this Court concluded that, although "special circumstances" were not defined in the EAJA, the legislative history "recognized two distinct categories of special circumstances: First, situations where the government proffers novel but credible extensions and interpretations of the law; and second, situations 'where equitable considerations dictate an award should not be made'" i.e., "a prevailing party's unclean hands." *Doria,* 8 Vet.App. 157, 162 (1995) (quoting H.R. REP. No. 1418, 96th Cong., 2d Sess. 11 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4953, 4984, 4990); *see Brinker v. Guiffrida*, 798 F.2d 661, 667 (3d Cir. 1986); *Oguachuba v. INS*, 706 F.2d 93, 98-99 (2d Cir. 1983) (finding EAJA special circumstances and denying award where appellant was "without clean hands" because of "notorious and repeated violations of United States immigration law"); *see also Locher*, 9 Vet.App. at 540. The government bears the burden of proof

to demonstrate the existence of such circumstances. *See Doria,* 8 Vet.App. at 163.

Applying *Doria* to the Secretary's argument, it becomes readily clear that such argument simply fails to come within either category of special circumstances. Accordingly, I believe that the "special circumstances" exception of 28 U.S.C. § 2412(d)(1)(A) cannot bar the appellant's application for attorney fees and expenses.

I respectfully dissent.

APPENDIX