UNITED STATES COURT OF VETERANS APPEALS

NO. 93-1189

THOMAS W. KEEL, APPELLANT,

V.

JESSE BROWN,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

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

O R D E R

The appellant's counsel advises that the appellant died on February 3, 1995. On November 9, 1995, the appellant, through counsel, filed an application for attorney fees and expenses under the Equal Access to Justice Act, 28 U.S.C. § 2412(d). On the same date, due to the appellant's death, counsel for the appellant moved to substitute Salina Rice, executrix of the appellant's estate, as the appellant. On July 24, 1995, this Court, unaware of the appellant's death, vacated and remanded the September 17, 1993, Board of Veterans' Appeals decision (Board). *Keel v. Brown*, 8 Vet.App. 82 (1995).

On November 29, 1995, citing *Landicho v. Brown*, 7 Vet.App. 42 (1994), this Court ordered counsel for the appellant to show cause why the Court's opinion in *Keel, supra,* should not be withdrawn and its judgment recalled under *Landicho,* and the instant EAJA application be dismissed. On December 27, 1995, counsel for the appellant filed a response which included a voluntary withdrawal of the EAJA application.

On consideration of the foregoing, it is

ORDERED that the judgment entered on August 15, 1995, and the mandate issued on October 16, 1995, are recalled. It is further

ORDERED that this Court's opinion issued on July 24, 1995, is withdrawn and the appeal is dismissed.

DATED: March 27, 1996 PER CURIAM.

NEBEKER, *Chief Judge,* concurring: The Court decided this case on the merits on July 24, 1995. *Keel v. Brown*, 8 Vet.App. 82 (1995). On November 9, 1995, the appellant's counsel notified the Court that he had learned in August 1995, while preparing the application for attorney fees under the EAJA, that the appellant had died on February 3, 1995; he moved for the substitution of Salina Rice, the executrix of the appellant's estate, for the appellant in the application for attorney fees. Then on December 27, 1995, counsel voluntarily withdrew his application for attorney fees in the face of the Court's November 29, 1995, order to show cause why the EAJA application should not be dismissed in light of the appellant's death prior to this Court's issuing its July 24, 1995, opinion.

Today, this Court accepts counsel's voluntary withdrawal of the EAJA application. Counsel withdrew his application for attorney fees after reviewing this Court's decision in *Landicho v. Brown*, 7 Vet.App. 42 (1994), which held that a claim for veterans' benefits under chapter 11 of title 38 of the U.S. Code dies with the veteran; hence a veteran's survivors cannot be substituted for the appellant in a case before this Court. *See also Erro v. Brown*, __ Vet.App. __, No. 94-16 (Jan. 29, 1996) (Court extended the reasoning of *Landicho* to a case wherein the children of a widow appealing a denial of survivor's benefits wished to be substituted for their mother after her death).

Under *Landicho,* I agree that the appellant's executrix could not be substituted for the appellant in terms of any award of chapter 11 benefits. However, I question whether the impossibility of substitution for chapter 11 benefits also means that fees and expenses under the EAJA are likewise precluded for professional services rendered before the death of the veteran. I believe there is justification for substituting the executrix for EAJA purposes.

In this regard, I duly note the Supreme Court's decision in a case dealing with a statutory provision similar to the EAJA and the question of whether a deceased plaintiff and a paroled plaintiff were prevailing parties, and therefore eligible for an award of attorney fees. *Rhodes v. Stewart*, 488 U.S. 1 (1988). The Court held there was no prevailing party status. The statutory provision regarding attorney fees in that case, the Civil Rights Attorneys' Fees Award Act, is, in some aspects, similar in purpose and language to the EAJA. *See* 42 U.S.C. § 1988(b) ("In any action or proceeding to enforce a provision of [various civil rights statutes], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."). Both statutory provisions require that the party asking for attorney fees be a "prevailing party" before those fees can be awarded. *See, e.g., Northcross v. Board of Ed. of Memphis City Schools*, 611 F.2d 624, 636 (6th Cir. 1979), *cert. denied,* 447 U.S. 911 (1980) ("The question as to whether the plaintiffs have prevailed is a preliminary determination, necessary before [§ 1988] comes into play at all."). Section 1988 differs from the EAJA in that, under § 1988, the award of attorney fees is made against the defendant personally. *See Pulliam v. Allen*, 466 U.S. 522, 544 (1984). EAJA awards, conversely, are paid from federal appropriations for legal services ultimately establishing unjustified legal positions of the government taken in relation to the plaintiff.

In *Rhodes*, the Supreme Court held that an award of attorney fees under § 1988 was in error where one of the incarcerated plaintiffs had died and one had been paroled before the district court had entered judgment on the underlying suit because they were not prevailing parties as required by the statute. Here, counsel has withdrawn his EAJA application; thus, we are not facing the issue of

whether an attorney for an appellant who would have been a prevailing party but for his death (unbeknownst to the Court or counsel) prior to the decision of the Court could get attorney fees under the EAJA for his representation of the deceased appellant. However, if we were, I would distinguish *Rhodes* from the instant case as not involving veterans' benefits laws. We have here the recent innovation of judicial review where veterans are confronted with a very limited resource of lawyers who are familiar with veterans' benefits adjudications. In these circumstances, to deny attorney fees, as was done in *Rhodes,* would result in something not considered by or presented to the Supreme Court in *Rhodes*--a chilling of the willingness of attorneys to take cases of older and infirm veterans who may die after much of the work has been done by counsel. To deny attorney fees in a case like the present one creates a disparate treatment of older or infirm veterans who are engaged in what is turning out to be a highly protracted benefits adjudication process. Such an outcome is particularly ironic since the vast majority of these appeals are from denials of applications for medical disability benefits, and many of these applicants are in the twilight of their years. The attorneys who perform hours of professional services when they take these cases should not be put in the position of doing so at their peril.

Moreover, I believe it quite plausible to attribute to the recent amendment of the EAJA, i.e., extending it to veterans' benefits litigation, an intent that prevailing party status not be locked into the *Rhodes* straitjacket. *See* Federal Courts Administration Act of 1992, Pub. L. No. 102-572, § 506, 106 Stat. 4506, 4513 (1992) (found at 28 U.S.C. § 2412 note). There can be no doubt as to the knowledge that, unlike civil rights litigation involving all ages, the veterans population is predominantly an aging and increasingly infirm group. In the face of that fact the recent amendment to that Act was hardly intended to result in a situation where that very group would be so disadvantaged by the chill resulting from a straight import of *Rhodes* into veterans' benefits litigation.

Nor will it do to apply the strict construction discipline required by the sovereign immunity doctrine. *See Jones v. Brown*, 41 F.3d 634, 638 (Fed. Cir. 1994) (Where Congress waives sovereign immunity over certain subject matter such as attorney fees, courts cannot narrow the waiver that Congress intended). At the time of the special amendment to EAJA in 1992 to include veterans' benefits litigation, the authorizing committees were aware of, and took steps to insure that, the aging veteran population was to secure special treatment once their claims were remanded for further development. *See* Veterans' Benefits Improvements Act of 1994, Pub. L. No. 103-446, § 302, 108 Stat. 4645 (1994), *reprinted in* 38 U.S.C. § 5101 note ("The Secretary of Veterans Affairs shall take such actions as may be necessary to provide for the expeditious treatment . . . of any claim that has been remanded by the Board of Veterans' Appeals or by the United States Court of Veterans Appeals for additional development or other appropriate action."); *see also The Role of the Department of Veterans Affairs in National Health Care Reform: Hearings Before the House Comm. on Veterans' Affairs*, 103d Cong., 1st Sess. (1993) (statement of Samuel V. Spagnolo, M.D.) ("Fifty percent of all living veterans (27 million) are older than 56 years . . . . The number of veterans aged 75 and older will increase 193% during [the] next two decades. In just 7 years, by 2000, 3.8 million veterans will be over 75, over twice the current number . . . ."), *available in* 1993 WL 755017; *Hearings Before the Senate Appropriations Subcomm. on VA, HUD, and Independent Agencies for*

FY 95, 103d Cong., 2d Sess. (1994) (statement of Warren Ashe, Ph.D.), *available in* 1994 WL 14188016.

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