Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

James M. Nicolaw
Docket No. A-13-12
May 13, 2013

RECOMMENDED DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

Respondent James M. Nicolaw appealed the October 16, 2012 decision of an Administrative Law Judge (ALJ) of the Departmental Appeals Board denying Respondent's application for attorney fees and expenses under the Equal Access to Justice Act in connection with his appeal of a civil money penalty (CMP) and an assessment in lieu of damages imposed by the Inspector General (I.G.) of the Social Security Administration (SSA). *Social Security Administration v. James M. Nicolaw*, DAB CR2647 (2012) (ALJ Decision). We recommend that the SSA Commissioner sustain the ALJ Decision. The ALJ did not err in determining that under the statute, applicable regulations, and case law, Respondent was not a "prevailing party" as required to qualify for an award of attorney fees.

Applicable law

The Equal Access to Justice Act (EAJA), as relevant here, directs federal agencies to "award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with" an agency-conducted "adversary adjudication," unless "the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust." 5 U.S.C. § 504(a)(1). The statute defines "party" as, among other requirements, "an individual whose net worth did not exceed $2,000,000 at the time the adversary adjudication was initiated." 5 U.S.C. § 504(b)(1)(B).

The Department of Health and Human Services (HHS) implemented the EAJA provisions in regulations at Part 13 of 45 C.F.R. The ALJ applied the HHS EAJA regulations to Respondent's request for attorney fees and expenses "in the absence of similar regulations promulgated by the Commissioner" of SSA. ALJ Decision at 3. Neither party disputes that the HHS regulations are applicable to this proceeding or asserts that other regulatory procedures should be applied. The Part 13 regulations "describe the circumstances under which the Department may award attorney fees and certain other expenses to eligible individuals and entities who prevail over the Department in certain administrative proceedings." 45 C.F.R. § 13.1. The regulations

state that "an applicant has prevailed when the agency has made a final disposition favorable to the applicant with respect to any matter which could have been heard as a separate proceeding, regardless of whether it was joined with other matters for hearing." 45 C.F.R. § 13.22(c).

The Part 13 regulations also provide that "[t]he appellate authority for any [ALJ] proceedings shall be the official or component that would have jurisdiction over an appeal of the merits." 45 C.F.R. § 13.27(a). Respondent's "appeal of the merits" of the I.G.'s CMP and assessment determination was heard by the ALJ under SSA regulations at 20 C.F.R. Part 498, which direct the Board, upon review of an ALJ decision, to remand the case to the ALJ for further proceedings or to issue a recommended decision to the SSA Commissioner. 20 C.F.R. § 498.221(h).

Background[1]

This matter began when the I.G. informed Respondent by letter dated January 24, 2012, that he was subject to a CMP and assessment under section 1129 of the Social Security Act (Act) for failing to report having engaged in work activity while receiving Social Security disability benefits. Section 1129 authorizes a CMP of up to $5,000 for each knowing misrepresentation or false statement of material fact made to SSA for use in determining eligibility for or the amount of benefits, or for each monthly benefit received while knowingly withholding disclosure of a material fact. Section 1129 also authorizes an "assessment, in lieu of damages" up to twice the amount of benefits overpaid due to such false or misleading statements or omissions.

The I.G. alleged that from November 2008 through May 2011 Respondent improperly received $27,161 in disability insurance benefits under title II of the Act while working at a Nevada pizza parlor owned by his wife or by him and his wife. The I.G. proposed to levy an assessment in lieu of damages in the amount of the benefits improperly received and to impose a CMP of $15,000 based on one false statement and two omissions. The CMP amount, the I.G. stated, was reduced from a maximum penalty of $160,000 based on 31 omissions and one false statement. Respondent requested an ALJ hearing under 20 C.F.R. Part 498 to contest the CMP and assessment. The ALJ scheduled a hearing for September 11 and 12, 2012 and ordered the parties to exchange pre-hearing briefs, witness lists, proposed exhibits, and discovery requests.

[1] The background information is taken from the parties' submissions, including proposed exhibits or other documents attached thereto, in the ALJ proceedings on the CMP and assessment under 20 C.F.R. Part 498 and on the request for EAJA attorney fees under 45 C.F.R. Part 13. The ALJ did not formally admit any exhibits or rule on their admissibility in either proceeding.

After Respondent provided certain documents to the I.G. as exhibits to a motion to dismiss, the I.G. moved that the ALJ "dismiss this case with prejudice" on the ground that the I.G. "no longer seeks" and "will not seek penalties or an assessment in lieu of damages against the Respondent based on the misconduct alleged in [the I.G.'s] January 24, 2012 penalty letter to the Respondent." I.G. Motion to Dismiss in Light of New Evidence at 1-2.[2] Respondent subsequently filed a motion requesting, among other things, that the I.G.'s motion be granted "with prejudice." Respondent's Response to Motion to Dismiss and Reply to Responses by the Petitioner to Respondent's Motion to Dismiss, at 5. On June 27, 2012, the ALJ issued an order (ALJ Order) dismissing the hearing request pursuant to 20 C.F.R. § 498.202(f)(3), though the ALJ did not specify at the time whether the dismissal was with or without prejudice to the I.G.'s ability to refile a CMP and assessment action against Respondent.[3] The ALJ stated that his "jurisdiction is limited to determining whether or not a Respondent should be found liable for a CMP and/or assessment under 20 C.F.R. Part 498 and the amounts of each." ALJ Order at 2. The ALJ then concluded that "when the SSA I.G. withdraws the proposal to impose a CMP and/or assessment[,] there is no longer any issue that I may address or for which I may grant any relief and the request for hearing must be dismissed." *Id*.

On August 21, 2012, Respondent filed with the ALJ a motion for the award of attorney fees and expenses under EAJA. Respondent argued before the ALJ (among other grounds) that he was a prevailing party eligible for an award of attorney fees and expenses under EAJA.

The ALJ Decision

The ALJ concluded that Respondent "is not a prevailing party" eligible for an award under EAJA and the regulations because the dismissal of the CMP action was "without prejudice as it was at the request of SSA." ALJ Decision at 7. The ALJ further stated: "Because no adjudication on the merits occurred, I did not intend to dismiss the case with prejudice with res judicata effect, which could subsequently be raised as a bar to SSA reinitiating its action." *Id*. at 5. The ALJ reiterated that "absent an adjudication and decision on the merits, I am without authority to bar the I.G. from reinitiating an

[2] I.G. counsel stated that the motion to dismiss "does not affect the $27,161 overpayment" that in any event was not before the ALJ under Part 498, which addresses only the imposition of CMPs and assessments and not overpayments of Social Security benefits. I.G. Motion to Dismiss in Light of New Evidence at 2.

[3] Section 498.202(f)(3) provides that "[t]he ALJ shall dismiss a hearing request [challenging the I.G's imposition of CMPs and assessments] where . . . [t]he respondent's hearing request fails to raise any issue which may properly be addressed in a hearing under this part."

adversary adjudication based on the same facts."[4] *Id*. at 7. In reaching this conclusion, the ALJ relied on two decisions by the United States Court of Appeals for the District of Columbia that held a litigant does not qualify as a "prevailing party" under EAJA where the underlying agency administrative action was dismissed without prejudice because such "a dismissal . . . has no res judicata effect and provides no judicial relief . . . as the relative positions of the parties are unchanged and the agency may reinitiate its action based on the same facts." *Id*. at 6-7, citing *Green Aviation Mgmt. Co., LLC v. F.A.A.*, 676 F.3d 200 (D.C. Cir. 2012), and *Turner v. Nat'l Transp. Safety Bd.*, 608 F.3d 12 (D.C. Cir. 2010).

Standard of review

The standard of review on a disputed factual issue is whether the ALJ decision is supported by substantial evidence in the record as a whole. The standard of review on a disputed issue of law is whether the ALJ decision is erroneous. Board *Guidelines – Review of Initial Decisions on Fee Applications Under the Equal Access to Justice Act* at http://www.hhs.gov/dab/divisions/appellate/guidelines/eaja.html; *see also* 20 C.F.R. § 498.221(i) (Board "will limit its review to whether the ALJ's initial decision is supported by substantial evidence on the whole record or contained error of law.").

Analysis

As an initial matter, we note that under the controlling regulation cited in the ALJ Order, section 498.202(f)(3), the ALJ dismissed Respondent's hearing request (as the regulation required) because the I.G. withdrew the proposed CMP and assessment and left Respondent without "any issue which may properly be addressed in a hearing" under Part 498. Upon the I.G.'s determination to no longer pursue the CMP and assessment action, Respondent no longer had a legal right to a hearing and his consent or agreement to the I.G.'s motion was not required for the ALJ to dismiss the hearing request. Thus, absent any active case or legal dispute before him, the ALJ properly dismissed Respondent's hearing request because there was no basis for the ALJ to render a judgment on the merits of the withdrawn penalty and assessment.

Respondent argues before us that he was a "prevailing party" because the I.G. "asked that the action be dismissed with prejudice" and Respondent "gave up his legal right to a hearing and final disposition in this matter based upon" the I.G.'s assurance not to seek

[4] The ALJ further concluded that he had been barred from granting the I.G.'s request to dismiss the case with prejudice to I.G.'s ability refile the CMP and assessment action by 20 C.F.R. § 498.204(c)(4) , which provides that an ALJ "does not have the authority to . . . [e]njoin any act of the Commissioner or the Inspector General" of SSA. ALJ Decision at 5. We need not determine here whether this provision bars an ALJ from dismissing a case with prejudice at SSA's request, given that the ALJ did not, in fact, grant that request.

penalties against him in the future based upon the same alleged misconduct. Respondent Exceptions at 3. This argument is without merit. We agree with the ALJ that Respondent was not a "prevailing party" within the scope of EAJA because that status arises only when an adjudicator issues a dispositive ruling on the merits in favor of the party seeking an EAJA award or dismisses a case "with prejudice" such as to bar the agency from again bringing the same action against that party. ALJ Decision at 4-7. The ALJ concluded, based on the reasoning in *Turner* and *Green Aviation*, that the ALJ Order here did not render Respondent a prevailing party eligible for an EAJA award because the ALJ dismissed the CMP and assessment case without prejudice to the I.G.'s ability to refile the action.

In *Turner*, the court found that two pilots against whom the Federal Aviation Administration (FAA) withdrew administrative complaints were not "prevailing parties" under EAJA where the ALJ in that case "terminated the proceedings" with an order "that did not specify whether the termination was with or without prejudice." *Turner*, 608 F.3d at 13; ALJ Decision at 6, citing *Turner*. The *Turner* court first concluded that the ALJ's dismissal order was issued without prejudice, even though the order was "silent on the subject," as this was "consistent with the rule in civil proceedings [that] when a court dismisses a complaint at the request of the plaintiff, the dismissal is presumed to be without prejudice." 608 F.3d at 15, citing Fed.R.Civ.P. 41(a)(2). The court then concluded that "[b]ecause the ALJ dismissed the cases without prejudice, there was nothing in this case analogous to judicial relief" and "therefore [they] were not prevailing parties."[5] 608 F.3d at 16; *see also* ALJ Decision at 6, citing *Turner*. Moreover, the court characterized the ALJ dismissal without prejudice in that case as "an administrative housekeeping measure, not a form of relief," because the FAA's withdrawal of its complaints, for which ALJ permission was not required by FAA regulations, left the parties "where they were before the complaint was filed." *Turner*, 608 F.3d at 16.

The court in *Green Aviation*, the case Respondent relied upon before the ALJ, found that an ALJ's dismissal of an enforcement action *with* prejudice, following the FAA's withdrawal of its complaint under regulations requiring such dismissal be with prejudice, gave rise to prevailing party status.[6] *See* Respondent ALJ Reply at ¶ 2, citing *Green Aviation*. The court in *Green Aviation* concluded that, in contrast to *Turner*, the agency

[5] The *Turner* court referenced the "'three-part test' for determining whether a party has 'prevailed'" it previously "distilled from" the Supreme Court's decision in *Buckhannon Bd. & Care Home, Inc. v. W.Va. Dep't of Health & Human Res.*, 532 U.S. 598, at 603–06 (2001): "(1) there must be a 'court-ordered change in the legal relationship' of the parties; (2) the judgment must be in favor of the party seeking the fees; and (3) the judicial pronouncement must be accompanied by judicial relief." *Turner*, 608 F.3d at 15 (citations omitted). The ALJ only addressed the third prong of this test. However, it appears from the record that Respondent also did not establish that the first two prongs of the test were met because the parties were in the same legal position as before the administrative action was filed and the ALJ did not issue a judgment in favor of the Respondent.

[6] Different regulations applied in *Turner* and *Green Aviation*, which involved different administrative adjudicative processes.

"could not re-file a complaint based on the same set of facts because the dismissal with prejudice has *res judicata* effect." *Green Aviation*, 676 F.3d at 205. As such, the dismissal with prejudice "was a clear form of judicial relief, not simply a 'housekeeping measure,'" unlike the dismissal at issue in *Turner*. *Id.* We agree with the ALJ that Respondent's reliance on *Green Aviation* was misplaced here because here the ALJ's dismissal was not with prejudice against the I.G.[7]

Based on these two cases, the ALJ correctly observed that "one qualifies as a prevailing party for purposes of 5 U.S.C. § 504 when there is a dismissal of the action with prejudice because there is judicial relief, in that further action by the agency on the same facts is barred by the defense of res judicata" and that "dismissal without prejudice has no res judicata effect and provides no judicial relief . . . as the relative positions of the parties are unchanged and the agency may reinitiate its action based on the same facts." ALJ Decision at 6-7, citing *Turner*, *Green Aviation*, and *Buckhannon*. As in *Turner*, the ALJ's dismissal here was without prejudice. ALJ Decision at 5. The ALJ also correctly ruled that "[t]here was no adjudication on the merits in this case because the SSA election not to pursue the prosecution of its CMP and assessment action against Respondent deprived me of authority or jurisdiction to review the merits of the action." *Id.*; *see also Buckhannon*, at 603 (prevailing party status requires "some relief on the merits."). Like the situation in *Turner*, the I.G. here did not need the ALJ's permission to withdraw its action, as the regulations grant the I.G. "exclusive authority to settle any issues or case, without the consent of the [ALJ] or the Commissioner, at any time prior to a final determination." 20 C.F.R. § 498.126. The I.G.'s decision not to pursue the CMP and assessment action against respondent prior to the ALJ having adjudicated the merits of the I.G.'s case left the ALJ with no case before him and the parties effectively "where they were before" the action was filed. *Turner*, 608 F.3d at 16. The ALJ Order does not discuss the specific grounds the I.G. alleged for bringing its action or the concomitant evidence, Respondent's defenses, or the "new evidence" that led the I.G. to withdraw the charges. In no sense can the ALJ Order reasonably be construed as having granted relief "on the merits." Thus, the ALJ did not err in concluding that Respondent was not a prevailing party as required to be eligible for an EAJA award.

Respondent also argues he is entitled to an EAJA award because "[i]t was not until counsel for the Respondent was forced to file multiple motions for bad faith and prosecutorial misconduct with voluminous exhibits attached" that the I.G. withdrew the CMP and assessment and moved that the case be dismissed with prejudice. Respondent Reply to I.G. Response at 5. Respondent's argument that his actions involved in filing the appeal brought about SSA's withdrawal of the charges against him does not provide a basis to find him a "prevailing party." In *Buckhannon*, the Supreme Court rejected the

[7] Before us, Respondent did not cite to *Green Aviation* as providing legal authority to support his argument that the ALJ erred in concluding that he was not a prevailing party. Indeed, Respondent did not cite to any legal authority in his briefing before us in support of his argument.

similar "catalyst" theory as applied to plaintiffs, i.e., "that a plaintiff is a 'prevailing party' if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant's conduct." *Buckhannon*, at 601, 604-05. The Court stated that such "voluntary change in conduct . . . lacks the necessary judicial *imprimatur* on the change." *Buckhannon*, at 605; *see also S.Z., Aggrieved Party*, DAB No. 2482, at 7 (2012) (citing *Buckhannon* in rejecting the argument that a plaintiff in an agency action "has prevailed for EAJA purposes" because the agency's decision to withdraw the challenged policy "served precisely the same purpose as a decision by the DAB"). We are not aware of any basis in the EAJA statute or regulations for finding "prevailing party" status exists as a sanction for "bad faith" conduct on the part of the agency. We also note that in his Order dismissing the case, the ALJ specifically found "no basis for the imposition of a sanction against either party in this case, including the award of attorney's fees or costs due to any failure or misconduct of counsel for either party." ALJ Order at 3.

Respondent also argues that "[t]he doctrine of promissory estoppel is applicable here" because he "relied upon [the I.G.'s] assertion that it would not seek further penalties in agreeing to" the I.G.'s motion to dismiss, which Respondent did "with the caveat that it be granted with prejudice." Respondent Exceptions at 3. It is not clear that equitable estoppel doctrines can ever lie against the government, but here Respondent does not even show the elements of estoppel were met. *Oaks of Mid City Nursing & Rehab. Ctr.*, DAB No. 2375, at 31 (2011) (citations omitted) ("traditional requirements for estoppel are . . . a factual misrepresentation . . . reasonable reliance on the misrepresentation by the party seeking estoppel, and harm or detriment to that party as a result of the reliance"). Among other reasons, Respondent's consent or agreement was not required for the ALJ to dismiss the case under the applicable regulations. Instead, as the ALJ accurately stated, dismissal of Respondent's hearing request was required after the I.G. withdrew its determination to impose a CMP and assessment, thus eliminating "'any issue which may properly be addressed in a hearing under' 20 C.F.R. Part 498." ALJ Decision at 4, citing section 498.202(f)(3).

Because the ALJ's conclusion that Respondent was not a prevailing party eligible to be considered for an award of attorney fees and expenses under EAJA was not erroneous, we do not need to address the ALJ's additional conclusion that Respondent did not meet the financial eligibility requirements for an award. It is not disputed that Respondent failed to comply with the requirement that "[e]ach applicant [for attorney fees] must provide with its application a detailed exhibit showing the net worth of the applicant . . . when the proceeding was initiated," 45 C.F.R. § 13.11(a) (emphasis added), and argued that SSA was already aware of his financial circumstances. Although the ALJ found that Respondent failed to present evidence to establish his financial eligibility, the ALJ did not reject the EAJA application based on that ground and because he concluded that Respondent was not a prevailing party, the ALJ declined to order Respondent to provide

the net worth exhibit (which Respondent now says he would have produced). ALJ Decision at 3-4; Respondent Exceptions at 2. Accordingly, we need not and do not reach the issue of financial condition here.

Conclusion

We recommend that the Commissioner affirm the ALJ Decision denying Respondent's application for attorney fees and expenses.

/s/
Judith A. Ballard

/s/
Leslie A. Sussan

/s/
Stephen M. Godek
Presiding Board Member