Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

S.Z., Aggrieved Party
Docket No. A-12-110
Decision No. 2482
October 11, 2012

DECISION

This case involves an application for attorney fees and other expenses under the Equal Access to Justice Act (EAJA). The application was submitted by S.Z., an aggrieved party who filed a complaint with the Departmental Appeals Board (Board) seeking review of National Coverage Determination (NCD) 260.1 pursuant to 42 C.F.R. Part 426. That complaint was ultimately dismissed by the Board after the Centers for Medicare & Medicaid Services (CMS) notified the Board that it had reconsidered the NCD and withdrawn it. In her EAJA application, S.Z. maintains that she met the requirements in EAJA for an award of attorney fees and expenses, including the requirement that the party seeking an award have prevailed in the proceeding for which fees and expenses are sought.

As discussed in detail below, we deny S.Z.'s EAJA application on the ground that she was not a prevailing party in the Board proceeding for which she sought attorney fees and expenses. Thus, S.Z. did not meet one of the threshold requirements for entitlement to an award.

Statutory and Regulatory Background

National Coverage Determination Complaint Process

Section 1869(f)(1) of the Social Security Act (Act), 42 U.S.C. § 1395ff(f), authorizes the Board to review NCDs "[u]pon the filing of a complaint by an aggrieved party." Act § 1869(f)(1)(A)(iii). Section 1869(f)(1)(B) defines the term "national coverage determination" as "a determination by the Secretary with respect to whether or not a particular item or service is covered nationally under [title XVIII (Medicare)]." NCDs are issued by CMS, apply nationally, and are binding at all levels of administrative review of Medicare claims. 42 C.F.R. § 405.1060.

Section 1869(f)(1)(A)(iii)(I) provides that, in conducting a review of an NCD, the Board—

> shall review the record and shall permit discovery and the taking of evidence to evaluate the reasonableness of the determination, if the Board determines that the record is incomplete or lacks adequate information to support the validity of the determination[.]

The regulations implementing section 1869(f)(1) provide in relevant part that if the Board determines that an NCD complaint is acceptable, the Board notifies both the aggrieved party and CMS and requires CMS to provide a copy of the NCD record to the Board and all parties within 30 days. 42 C.F.R. § 426.510(d). Within 30 days of receipt of the NCD record, or within additional time allowed by the Board for good cause shown, the aggrieved party must "file a statement explaining why the NCD record is not complete, or not adequate to support the validity of the NCD under the reasonableness standard." 42 C.F.R. § 426.525(a). CMS has 30 days from receipt of this statement "to submit a response to the Board in order to defend the NCD." 42 C.F.R. § 426.525(b). After the aggrieved party files its statement and CMS responds, or the time for filing has expired, the Board "applies the reasonableness standard to determine whether the NCD record is complete and adequate to support the validity of the NCD." 42 C.F.R. § 426.525(c)(1).

If the Board issues a decision finding the record complete and adequate to support the validity of the NCD, the review process ends. 42 C.F.R. § 426.525(c)(2). If the Board determines that the NCD record is not complete and adequate to support the validity of the NCD, the Board permits discovery and the taking of evidence. 42 C.F.R. § 426.525(c)(3). As part of the process, the Board will conduct an evidentiary hearing (unless the matter can be decided on the written record) and may consult with appropriate scientific or clinical experts. 42 C.F.R. § 426.531. If the Board determines that the new evidence has the potential to significantly affect its evaluation of the NCD, then the Board stays the proceedings and allows CMS 10 days to decide whether to initiate a reconsideration. If CMS decides to initiate a reconsideration, the Board sets a timeframe by which CMS must complete the reconsideration. 42 C.F.R. § 426.340(d), (e). If CMS does not initiate a reconsideration or does not meet the timeframe, the Board proceeds with the NCD review. 42 C.F.R. § 426.340(f). Generally, the Board must issue a written decision within 90 days of closing the NCD review record to the taking of evidence. 42 C.F.R. § 426.547(a)(1).

The regulations specifically provide that CMS must notify the Board within 48 hours if it withdraws or removes the NCD or NCD provision under review. 42 C.F.R. § 426.520(c). If the Board receives such notice before it issues a decision, the Board must dismiss the complaint and inform the aggrieved party that he or she will receive individual claim review without consideration of the withdrawn/retired provision. 42 C.F.R. § 426.520(e)(1). CMS's withdrawal or removal of the NCD or NCD provision under review "has the same effect as a decision" by the Board finding that the NCD or NCD provision is invalid under the reasonableness standard. 42 C.F.R. § 426.520(a), (b) (referring to 42 C.F.R. § 426.560(b)).

Equal Access to Justice Act Proceedings

EAJA provides in relevant part:

> An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, 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. Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought.

5 U.S.C. § 504(a)(1) (emphasis added). An "adversary adjudication" is defined by EAJA as an "adjudication under section 554 of this title in which the position of the United States is represented by counsel or otherwise." 5 U.S.C. § 504(b)(1)(C). Section 554 applies to "every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing[.]"

The regulations of the Department of Health and Human Services implementing EAJA state that the "Department may reimburse parties for expenses incurred in adversary adjudications if the party prevails in the proceeding and if the Department's position in the proceeding was not substantially justified . . . ." 45 C.F.R. § 13.1 (emphasis added). Section 13.3(b) provides that the Department proceedings listed in Appendix A of Part 13 are covered by EAJA. Section 13.3(b) specifies other types of proceedings that are also covered. It is undisputed that proceedings in an NCD complaint are neither included in the list in Appendix A nor one of the types of other proceedings specified in section 13.3(b). However, section 13.3(b) also provides that "a party may file a fee application" and "argue that [EAJA] covers the proceeding" and, further, that "[a]ny coverage issue shall be determined by the adjudicative officer . . . ." The term "adjudicative officer" is defined in EAJA as "the deciding official . . . who presided at the adversary adjudication[.]" 5 U.S.C. § 504(b)(1)(D).

Case Background

On July 26, 2011, S.Z. filed a complaint seeking review by the Board of NCD 260.1, Adult Liver Transplantation. On July 29, 2011, the Board notified S.Z. and CMS of its determination that this complaint, identified as Docket No. A-11-98, was acceptable and summarized the review process set out in the regulations. On September 28, 2011, S.Z. filed the Statement of Aggrieved Party explaining why the record was not complete or adequate to support the validity of the NCD under the reasonableness standard. At S.Z.'s request, the Presiding Board Member held a telephone conference on October 20, 2011,

the results of which were summarized in the Board's letter of the same date. The letter indicated that S.Z. had requested that the Board permit her to file a supplement to her September 28, 2011 statement when the results of a new multi-center study were published and that CMS had no objection. The letter further stated:

> The Aggrieved Party will submit a supplement to its September 28, 2011 statement under 42 C.F.R. § 426.525 no later than November 30, 2011, unless the Board grants a further extension for the submission.
>
> CMS will submit its response to the Aggrieved Party's statement under 42 C.F.R. § 426.525 no later than 30 days after receiving the Aggrieved Party's supplemental submission.

Summary of Results of October 20, 2011 Conference Call at 2. The letter also noted CMS's statements at the conference that it began formal reconsideration of the NCD on October 14, 2011, and that the reconsideration process, which typically takes about nine months, would "continue independent of the Board proceedings." *Id*. On November 29, 2011, the Board granted S.Z.'s motion for an extension of time to January 30, 2012 to submit the supplement to her September 28, 2011 statement. On January 30, 2012, the Board granted S.Z.'s motion for an extension until March 30, 2012 for the same purpose as the prior extension. S.Z. submitted as an exhibit to the latter motion a presentation on the multi-center study made at a meeting of the American Association for the Study of Liver Disease, which she stated was under review for publication. On March 19, 2012, the Board granted S.Z.'s motion for an extension of time until June 28, 2012 for the same purpose as the prior extensions.

On April 25, 2012, S.Z. filed the supplement to her September 28, 2011 statement. In her April 25 submission, S.Z. stated that "as a result of the instant NCD challenge," CMS's Coverage & Analysis Group (CAG) had issued a proposed decision to eliminate the NCD and that, if the proposed decision becomes final, "which should occur by the end of June, 2012, that action will fully and favorably resolve the instant complaint." Letter dated 4/25/12, at 1. S.Z. therefore requested "that the Board stay this matter pending a final decision" by the CAG. *Id*. The Board advised the parties on May 7, 2012 that the request for a stay pending a final decision by the CAG had been granted. On June 22, 2012, CMS notified the Board that "CMS is withdrawing the NCD under review" and stated that "because CMS is withdrawing the NCD, this action should be dismissed pursuant to 42 C.F.R. § 426.520(e)." On June 27, 2012, S.Z. wrote to the Board that she agreed to dismissal of the NCD complaint pursuant to that section. On June 28, 2012, the Presiding Board Member dismissed the NCD complaint "pursuant to section 426.520(e)(1)." Dismissal of Complaint dated 6/28/12, at 1.

On July 27, 2012, S.Z. submitted the Aggrieved Party's Application for Costs and Fees Pursuant to the Equal Access to Justice Act, seeking an award of attorney fees and other expenses incurred by S.Z. in connection with Docket No. A-11-98. In a letter to the parties dated August 15, 2012, the Board stated that "[i]t is unclear whether the Equal Access to Justice Act (EAJA) applies here." The Board identified as a "threshold issue" "whether the proceedings before the Board in Docket No. A-11-98 involved an adjudication under 5 U.S.C. § 554" and "whether CMS's position was represented by an attorney who participated in the proceeding." Letter dated 8/15/12, at 3. The Board requested that, in its answer to the EAJA application, CMS address this threshold issue as well as "whether the aggrieved party 'prevail[ed] over the Department,' as required by 45 C.F.R. § 13.1, in light of the fact that CMS withdrew the NCD." *Id*.

In its answer, CMS argues that none of the threshold issues identified by the Board can be resolved in S.Z.'s favor and that, even if those issues could be resolved in her favor, CMS's position was substantially justified. In her reply, S.Z. argues that all of the threshold issues can be resolved in her favor and that CMS's position was not substantially justified.[1]

Discussion

As discussed in detail below, we deny S.Z.'s EAJA application because we conclude that S.Z. was not a prevailing party in the proceedings in Docket No. A-11-98. Since this conclusion is sufficient as a basis for denying the application, we need not decide whether the Board proceedings in that case constituted an adjudication under EAJA or whether CMS's position was represented by counsel, and nothing in this decision should be read as resolving those threshold issues.

As noted, EAJA provides for making an award to "a prevailing party," and the EAJA regulations provide for an award "if the party prevails in the proceeding." S.Z. takes the position that she was the prevailing party in the proceedings before the Board in Docket No. A-11-98 because CMS withdrew the NCD. AP Reply at 6. As discussed below, we find no merit in this argument. CMS withdrew the NCD after reconsidering it in a process that was separate from the process provided in 42 C.F.R. Part 426 for Board review of the NCD. CMS's withdrawal of the NCD in effect gave S.Z. the relief she sought in her NCD complaint by removing an obstacle to Medicare coverage of the adult

[1] With her application, S.Z. submitted documentation of her net worth. CMS does not contest her assertion that this documentation establishes that S.Z. qualifies, under section 13.4(b)(3), as an "eligible applicant" for an EAJA award. After the EAJA application was filed, counsel for S.Z. requested that S.Z.'s family be substituted as the applicant for an award following S.Z.'s recent death. CMS did not object to the substitution.

liver transplantation procedure in question. However, this did not make her the prevailing party in the Board proceeding on the NCD complaint.

The preamble to the NCD regulations notes that CMS had "previously established a procedure by which individuals could seek reconsideration of policies established in an" NCD. 68 Fed. Reg. 63,692 (Nov. 7, 2003) (citing 68 Fed. Reg. 55,634, 55,641). Explaining the differences between an NCD "review" pursuant to section 1869(f)(1) of the Act and an NCD "reconsideration," the preamble states in part:

> If the aggrieved party believes that we, or the contractor, misinterpreted evidence or excluded available evidence in making the coverage determination or has new evidence to submit, then the aggrieved party has the option to file a request for a reconsideration by the contractor or us, respectively, or to file a complaint to seek review by an adjudicator.
>
> In the reconsideration process, all interested parties, not just aggrieved parties, have the opportunity to submit new scientific and medical evidence for review by individuals with medical and scientific expertise. The reconsideration process permits experts to make judgments about those policies, rather than using an adjudicatory proceeding.

68 Fed. Reg. 63,692, at 63,694. This language makes clear that CMS's reconsideration of an NCD at the request of an aggrieved party or other interested party is separate from the NCD review process created by statute.[2]

CMS asserts, and S.Z. does not dispute, that CMS "withdrew the NCD after formal reconsideration on a separate track that was distinct and outside the NCD Board review process" (CMS Response at 25). In any event, it is clear from the procedural history of this matter that this was what occurred here. After CMS announced that it had initiated reconsideration of the NCD, the Board scheduled further proceedings in the review process at S.Z.'s request, setting a date (which the Board subsequently extended three times) for a submission supplementing S.Z.'s September 28, 2011 Statement of Aggrieved Party. Not until S.Z. made this supplemental submission on April 25, 2012 did S.Z. request that the Board stay its proceedings, on the ground that the CAG had issued a proposed decision to withdraw the NCD and was expected to make this its final decision within two months. In stating in her request for a stay that "<u>that action</u> will fully and favorably resolve <u>the instant complaint</u>" (emphasis added), S.Z. correctly recognized that CMS reconsideration of the NCD and Board review of the NCD complaint were two

[2] The record before us does not show whether CMS initiated reconsideration of the NCD in question here at the request of an interested party. However, nothing would appear to preclude CMS from reconsidering an NCD absent a request by an interested party.

different processes. Thus, although S.Z. arguably prevailed in the sense that the reconsideration process afforded her the relief she was seeking, she was not the prevailing party "in the proceeding," i.e., in the Board proceeding for which she seeks attorney fees and expenses.

S.Z. nevertheless argues that she "has prevailed for EAJA purposes" because CMS's decision to withdraw the NCD "served precisely the same purpose as a decision by the DAB" and "changed the relationship between the parties in that the Aggrieved Party was entitled to a review of her claim without consideration of the NCD . . . ." AP Reply Br. at 7. This view of what constitutes a prevailing party is contrary to federal case law. In *Buckhannon Board & Home Care v. W. Va. Dep't of Health & Human Resources*, 532 U.S. 598 (2001), the Supreme Court rejected the theory 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. Such a voluntary change in conduct, said the Court, "lacks the necessary judicial *imprimatur* on the change." 532 U.S. at 605. Instead, the Court held, there must be an "alteration in the legal relationship of the parties" that is effectuated by a court. *Id*. The Court identified a judgment on the merits and a consent decree as the two circumstances in which such an alteration occurs. *Id*.[3]

Here, the Board did not issue a judgment on the merits. The Board proceedings never reached the stage where the Board could have determined that the record was not complete and adequate to support the NCD. Even a determination in S.Z.'s favor on that issue would not have provided the relief requested since it would not have been dispositive, but would have been followed by discovery and possibly an evidentiary hearing before the Board could render a decision on the validity of the NCD. Moreover, the Board's Notice of Dismissal was not in the nature of a consent decree. The Board did not act to approve CMS's voluntary withdrawal of the NCD but rather dismissed

[3] Although *Buckhannon* involved fee-shifting statutes other than EAJA, the Court noted that the term "prevailing party" is "a legal term of art" used in numerous federal fee-shifting statutes (532 U.S. 600, 602), and the federal courts of appeal have held that the *Buckhannon* holding applies to EAJA as well. *See* CMS Response at 26, n.14, *citing cases*. In addition, *Buckhannon* involves an application for the costs of federal court litigation, but we see no reason why it should not also provide guidance in considering an application for the costs of administrative litigation.

complaint upon notice by CMS of its withdrawal, as required by regulation. Thus, any alteration of the parties' legal relationship in Docket No. A-11-98 resulted from a voluntary action by CMS, not from any action in the Board proceedings.[4]

Furthermore, none of the court decisions cited by S.Z. support its position that it was the prevailing party in Docket No. A-11-98. In *Marshall v. Comm'r of Soc. Sec.*, 444 F.3d 837 (6th Cir. 2006), the court found that the plaintiff was the prevailing party in a benefits litigation where the court ordered a remand to the Commissioner, retained continuing jurisdiction pending a decision from the Commissioner, and granted the plaintiff's "motion to affirm decision on remand." Unlike the situation in *Marshall*, in Docket No. A-11-98, the Board did not take any action that was tantamount to a remand to CMS, much less retain "continuing jurisdiction" pending a remand. Instead, as noted above, CMS itself initiated the reconsideration process while Board proceedings were at an early stage. Indeed, the only actions taken by the Board prior to the dismissal were to grant S.Z.'s repeated requests for extensions to supplement her submission and then to accede to her request for a stay based on her expectation that a withdrawal of the NCD was imminent.

In *Zheng Liu v. Chertoff*, 538 F.Supp.2d 1116 (D. Minn. 2008), the plaintiff requested that the court either adjudicate his naturalization application or remand his application to the U.S. Citizenship and Immigration Services for immediate adjudication. The court ordered a remand for adjudication of his naturalization application within a specified timeframe. The court concluded that the plaintiff was a prevailing party "because the court granted him relief that was substantially the relief [he] requested in his Petition." 538 F.Supp.2d 1121. In contrast, the Board did nothing in Docket No. A-11-98 to grant the relief that was requested in S.Z.'s NCD complaint.[5]

[4] We need not address here whether the analysis would be different in the situation where CMS undertook reconsideration under section 426.340 of the regulations (mentioned above). In such case, the reconsideration process would occur only **after** the Board had determined that the record for the NCD at issue was not complete and adequate to support the NCD, **after** the Board had taken additional evidence, and only **if** the Board had determined that the new evidence had the potential to significantly affect consideration of that NCD. Here, in contrast, the Board proceedings were only at a very preliminary stage at which no action was taken to address the merits of the aggrieved party's complaint.

[5] *Hardt v. Reliance Standard Life Insurance Co*, 130 S. Ct. 2149 (2010), is inapposite here because the fee-shifting provisions at issue there do not use the term "prevailing party" but rather provide that a court "in its discretion" may award fees and costs "to either party[.]" 130 S. Ct. at 2152.

Conclusion

For the foregoing reasons, we deny S.Z.'s EAJA application for attorney fees and expenses incurred in Docket No. A-11-98.

/s/
Leslie A. Sussan

/s/
Constance B. Tobias

/s/
Judith A. Ballard
Presiding Board Member