Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Social Security Administration,

v.

James M. Nicolaw,

Respondent.

Docket No. C-12-498

Decision No. CR2647

Date: October 16, 2012

DECISION DENYING RESPONDENT'S EQUAL ACCESS TO JUSTICE ACT AWARD APPLICATION

The application of Respondent, James M. Nicolaw, for attorney's fees and expenses pursuant to 5 U.S.C. § 504, the Equal Access to Justice Act (EAJA), is denied as Respondent was not the prevailing party in this case.

I. Procedural History

The Inspector General for the Social Security Administration (SSA) (Petitioner), notified Respondent by letter dated January 24, 2012 (January 24, 2012 notice), that the I.G. was imposing against Respondent a civil money penalty (CMP) of $15,000 and an assessment in lieu of damages in the amount of $27,161, pursuant to section 1129 of the Social Security Act (Act) (42 U.S.C. § 1320a-8) and 20 C.F.R. §§ 498.100-224. SSA alleged in its notice that the CMP and assessment were imposed based on the SSA determination that Respondent had made one material false statement and/or a false representation of material fact and multiple omissions of material fact that Respondent knew or should have known were false or misleading that affected his entitlement to benefits under the Act. Counsel for Respondent requested a hearing before an administrative law judge

(ALJ) pursuant to 20 C.F.R. § 498.202, by letter dated March 9, 2012. Counsel for Respondent filed a supplement to the request for hearing on March 26, 2012.

The request for hearing was received at the Civil Remedies Division of the Departmental Appeals Board (Board) on March 14, 2012, and assigned to me for hearing and decision on March 30, 2012. A prehearing conference was convened by telephone on April 16, 2012, the substance of which is set forth in my Scheduling Order & Notice of Hearing dated April 17, 2012. On May 21, 2012, I issued an Order Amending Scheduling Order & Notice of Hearing.

On May 29, 2012, Respondent filed a "Motion to Dismiss for Bad Faith and Constitutional Violations and Objections to Amended Scheduling Order." On May 30, 2012, Respondent filed a "Motion to Dismiss on Grounds of Prosecutorial/Attorney Misconduct." On June 7, 2012, SSA filed responses to Respondent's motions. SSA also filed on June 7, 2012, a motion to dismiss this case with prejudice. SSA stated as grounds that Respondent's counsel had produced new evidence based on which SSA determined to withdraw the prior determination, set forth in SSA's January 24, 2012 notice. On June 12, 2012, Respondent filed a reply to the SSA response to Respondent's motions and a response to the SSA motion to dismiss. In his response to the motion to dismiss, Respondent agreed that the SSA motion to dismiss should be granted with prejudice and he requested an award of attorney fees and costs pursuant to EAJA. SSA filed a reply on June 15, 2012. On June 18, 2012, Respondent requested a hearing on the pending motions. On June 26, 2012, SSA filed an opposition to Respondent's motion for a hearing on the motions and requested dismissal based on the existing record.

On June 27, 2012, I issued an order dismissing the case pursuant to 20 C.F.R. § 498.202(f)(3). On August 21, 2012, Respondent filed a motion for award of attorney fees and costs pursuant to EAJA (Respondent's application). SSA filed a response in opposition to the motion for fees and costs on August 28, 2012 (SSA Response). On September 11, 2012, Respondent filed a reply to the SSA response in opposition and requested a hearing (Respondent's Reply).

II. Discussion

My conclusions of law, including the findings and conclusions required by 45 C.F.R. § 13.26, are set forth in bold followed by the pertinent facts and analysis.

A. Respondent's request for oral argument is denied because oral argument is not necessary for a full and fair resolution.

I construe Respondent's September 11, 2012 request for a hearing on his application for fees and costs under EAJA (EAJA award) to be a request for oral argument on the application. The request for oral argument is denied. Respondent and SSA had the

opportunity to address the application for fees and costs as extensively as they deemed necessary in written pleadings. Respondent has not articulated how oral argument would assist with my decision on the application or identified any other benefit that oral argument might yield. Respondent has identified no statutory or regulatory authority establishing a due process right to oral argument on a motion or an application for an EAJA award. I conclude that oral argument is not necessary for a full and fair resolution of the application. Accordingly, the request for oral argument is denied.

B. Respondent's EAJA application was timely filed.

On August 30, 2012, I issued an order establishing a briefing schedule on Respondent's application. In the August 30 order, I stated my conclusion that the regulations of the Secretary of Health and Human Services (the Secretary) at 45 C.F.R. Part 13 that relate to EAJA applications applied in this case in the absence of similar regulations promulgated by the Commissioner. Neither party has disputed that the Secretary's regulations are applicable and neither party has asserted that some other regulatory procedures should be applied.

I stated in my Order of Dismissal dated June 27, 2012, that Respondent had 30 days from the date of issuance of that order to file an application for an EAJA award. Respondent did not file within 30 days of June 27, 2012, and SSA argues that the application should be denied as being untimely (SSA Response at 1-2, ¶ 1). Respondent argues that my June 27, 2012 Order of Dismissal was not final until 30 days after issuance when the time for filing appeals expired and his EAJA application was not due for another 30 days thereafter, i.e., on August 26, 2012. Respondent argues that he timely filed his EAJA application on August 21, 2012. The time for filing an EAJA application is specified by 5 U.S.C. § 504(a)(2) and 45 C.F.R. § 13.22(b). For purposes of this decision, I accept Respondent's application for an EAJA award as being timely filed.

C. Respondent's application for attorney fees and costs does not satisfy statutory and regulatory requirements because Respondent has failed to present evidence to establish his financial eligibility as required by 5 U.S.C. § 504(a)(2) and (b)(1)(B) and 45 C.F.R. §§ 13.4(b)(3) and 13.11(a). No net worth finding is possible.

Pursuant to 5 U.S.C. § 504(a)(2), a party that seeks an award of attorney fees and costs will submit to the agency an application which: (1) shows that the party is a prevailing party; (2) that the party is eligible to receive an EAJA award; (3) states the amount sought supported by an itemized statement of the actual time expended and the rate at which fees and expenses were calculated; and (4) which alleges that the position of the agency was not substantially justified. Respondent's August 21, 2012 application states the amount sought, includes supporting documents, and alleges that the agency's position was not substantially justified. The issue of whether Respondent is a prevailing party is resolved

against Respondent as discussed hereafter. Respondent has failed to present evidence necessary to establish his eligibility for an EAJA award. An individual party is eligible to receive attorney fees and costs under 5 U.S.C. § 504, only if his or her net worth at the time the adversary adjudication was initiated did not exceed $2,000,000. 5 U.S.C. § 504(b)(1)(B). Pursuant to 45 C.F.R. § 13.4(a) the applicant for an EAJA award must show that he or she meets all conditions of eligibility. Individuals are required to show that their net worth did not exceed $2,000,000 in order to be eligible. 45 C.F.R. § 13.4(b)(3). An applicant for EAJA fees must submit with his or her application a "detailed exhibit showing the net worth . . . when the proceeding was initiated." 45 C.F.R. § 13.11(a).

Respondent has failed to file evidence to show that his net worth did not exceed $2,000,000 when this adversary adjudication was initiated. Accordingly, I conclude that Respondent has failed to establish his eligibility for an EAJA award. Pursuant to 45 C.F.R. § 13.11(a), I have authority to order Respondent to file financial information. However, the regulation provides that further proceedings, such as ordering the production of additional evidence, should only be done when necessary for a full and fair resolution of the issues arising from the application. 45 C.F.R. § 13.25. I conclude that it is unnecessary for a full and fair resolution of the issues to require Respondent to file the necessary financial information, because I conclude that Respondent is not a prevailing party and not entitled to an EAJA award on that basis.

D. Respondent is not eligible for an EAJA award because he was not a prevailing party.

E. Whether or not the agency's position was substantially justified is not at issue because Respondent has not shown he is eligible for an EAJA award.

F. No EAJA award is required by 5 U.S.C. § 504(a)(1) or permitted by 45 C.F.R. § 13.1.

There is no dispute that the case I dismissed on June 27, 2012, was an adversary adjudication within the meaning of 5 U.S.C. § 504(b)(1)(C) and 45 C.F.R. § 13.3(a). Pursuant to 5 U.S.C. § 504(a)(2) and 45 C.F.R. §§ 13.1 and 13.22(c), Respondent has the burden, as a party seeking an EAJA award, to show that he is a prevailing party in the adversary adjudication.

My Order of Dismissal dated June 27, 2012, stated that the dismissal was pursuant to 20 C.F.R. § 498.202(f)(3), which requires that I dismiss a hearing request when the "respondent's hearing request fails to raise any issue which may properly be addressed in a hearing under" 20 C.F.R. Part 498. I explained in the Order of Dismissal that the SSA I.G.'s withdrawal of the prior determination to impose a CMP and assessment eliminated the basis for Respondent's request for hearing. Furthermore, by electing not to pursue the

CMP and assessment, SSA effectively deprived me of jurisdiction as 20 C.F.R. § 498.202(f)(3) requires dismissal when a hearing request fails to raise any issue that may be adjudicated under 20 C.F.R. Part 498.

SSA stated in its motion to dismiss filed on June 7, 2012, that SSA no longer sought penalties or an assessment and that it would not seek a CMP or assessment in the future based on the same alleged conduct that was the basis for the January 24, 2012 notice. SSA requested that I dismiss Respondent's request for a hearing with prejudice. SSA cited no law in support of the proposition that I may dismiss a request for hearing with prejudice against either party. The Commissioner's regulation states that:

> (f) The ALJ shall dismiss a hearing request where:
>
> (1) The respondent's hearing request is not filed in a timely manner and the respondent fails to demonstrate good cause for such failure;
> (2) The respondent withdraws or abandons respondent's request for a hearing; or
> (3) The respondent's hearing request fails to raise any issue which may properly be addressed in a hearing under this part.

20 C.F.R. § 498.202(f). The regulation does not specify that dismissal is with prejudice or authorize me to dismiss with prejudice against either party. Generally, a dismissal with prejudice occurs after adjudication on the merits and the dismissal has res judicata effect in any subsequent proceeding brought on the same grounds as the proceeding dismissed with prejudice. A dismissal without prejudice does not bar a subsequent action on the same grounds as the action dismissed without prejudice. *Black's Law Dictionary* 502 (18th ed. 2004). There 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. 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. Under the circumstances presented by this case, I further conclude that I have no authority, short of a decision on the merits, to bar SSA's exercise of discretion to reinitiate its CMP and assessment action. The Commissioner has provided by regulation that I have no authority to "[e]njoin any act of the Commissioner or the Inspector General." 20 C.F.R. § 498.204(c)(4). I am bound to follow the federal statutes and regulations and the limits they impose upon my jurisdiction. 20 C.F.R. § 498.204(c)(1). In this case, where there has been no adjudication on the merits, my granting a dismissal with prejudice, to the extent that it would purport to bar the SSA I.G. from initiating a new CMP and assessment action based on the same Respondent conduct alleged in the January 24, 2012 notice, would amount to an invalid attempt to enjoin the SSA I.G.'s action.

The issue then is whether or not Respondent is a prevailing party for purposes of an EAJA award given the fact that the dismissal of the adversary adjudication was without prejudice. Respondent cites *Green Aviation Management Co., LLC v. F.A.A.*, 676 F.3d 200, 205 (D.C. Cir. 2012) in support of his argument that he is a prevailing party in this adversary adjudication. Respondent argues that he is a prevailing party because SSA sought a CMP and assessment and Respondent obtained judicial relief because after the dismissal he was no longer subject to the CMP or assessment. Respondent's Reply ¶ 2. In *Green Aviation*, the U.S. Court of Appeals for the District of Columbia Circuit considered an appeal of the Federal Aviation Administration's (FAA) denial of attorney fees under EAJA. The application for attorney fees was denied by the FAA on grounds that Green Aviation was not the prevailing party in a case where the FAA initiated a CMP proceeding but then withdrew its complaint and the ALJ dismissed the proceedings with prejudice. *Green Aviation*, 676 F.3d at 201. The court noted that the FAA regulations required that if the agency attorney withdrew a complaint, the ALJ must dismiss the case with prejudice. The circuit court applied the Supreme Court decision in *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep't of Health & Human Res.*, 532 U.S. 598, 605, 121 S.Ct. 1835, 149 L.Ed.2d 855 (2001), to the EAJA claim under 5 U.S.C. § 504(a)(1) and observed that that decision establishes a three-part test to determine whether one is a prevailing party under EAJA:

> (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.

Green Aviation, 676 F.3d at 203 (citations omitted). The circuit court in *Green Aviation* concluded that the ALJ's dismissal with prejudice satisfied the test because the dismissal with prejudice had res judicata effect, i.e., there was judicial relief, as the dismissal with prejudice prevented the FAA from re-filing a complaint against Green Aviation on the same set of facts. *Green Aviation*, 676 F.3d at 204-05. The circuit court drew a distinction between the situation in *Green Aviation* and the situation that led to a different result in its decision in *Turner v. Nat'l Transp. Safety Bd.*, 608 F.3d 12 (D.C. Cir. 2010). In *Turner*, after the FAA withdrew its complaint against two pilots, the ALJ dismissed the matter without specifying whether the dismissal was with or without prejudice. In the *Turner* decision, the circuit court applied the presumption that a dismissal at the request of the plaintiff is without prejudice. The court in *Turner* concluded that a dismissal without prejudice did not result in judicial relief as the withdrawal by the FAA left the parties where they were before the complaint was filed. *Turner*, 608 F.3d at 15-16. According to the decisions of the circuit court in *Green Aviation* and *Turner*, 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. However, a dismissal

without prejudice has no res judicata effect and provides no judicial relief as required by *Buckhannon Bd. & Care Home, Inc.*, as the relative positions of the parties are unchanged and the agency may reinitiate its action based on the same facts. The U.S. Court of Appeals for the Tenth Circuit, where Respondent resides, has not specifically addressed the issue of prevailing party status where there is resolution of a case short of a decision on the merits. The dismissal in this case was without prejudice as it was at the request of SSA and, absent an adjudication and decision on the merits, I am without authority to bar the I.G. from reinitiating an adversary adjudication based on the same facts.

Accordingly, I conclude that Respondent is not a prevailing party and not entitled to an EAJA award pursuant to 5 U.S.C. § 504.

III. Conclusion

For the foregoing reasons, Respondent's application for an EAJA award is denied. The parties are advised as required by 45 C.F.R. § 13.27(a), that the appellate authority for this decision is the Board (20 C.F.R. § 498.220(c)); either party may seek review within 30 days of the date of this decision by filing and serving exceptions; and not more than 30 days after receipt of such exceptions, the opposing party may file its own exceptions to this decision. The Board procedures for filing the request for review are available at:

www.hhs.gov/dab/divisions/appellate/guidelines/ssa.html.

All submissions to the Board must be made by mail to:

Department of Health and Human Services
Departmental Appeals Board, MS 6127
Appellate Division
330 Independence Ave., S.W.
Cohen Building, Room G-644
Washington, D.C. 20201

/s/
Keith W. Sickendick
Administrative Law Judge